Customs Bulletin and Decisions

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Bureau of Customs and Border Protection

General Notices

General Program Test Extended: Quota Preprocessing

AGENCY: Customs and Border Protection; Department of Homeland Security.

ACTION: General notice.

SUMMARY: With this notice, the Bureau of Customs and Border Protection (CBP) announces that the duration of the quota preprocessing program test, which provides for the electronic processing of certain quota-class apparel merchandise prior to arrival of the importing carrier, is extended until December 31, 2008. The quota preprocessing program test is currently being conducted at all CBP ports and was set to expire on December 31, 2006. The duration of the test is being extended so that CBP can continue to evaluate the program's effectiveness. Public comments concerning any aspect of the program test as well as applications to participate in the test are requested.

DATES: The program test is extended to run until December 31, 2008. Applications to participate in the test and comments concerning the test will continue to be accepted throughout the testing period.

ADDRESSES: Written comments regarding this notice or any aspect of the program test should be addressed to Christine Kegley, Quota Enforcement and Administration, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Room 5.3-D, Washington, DC 20229, or may be sent via e-mail to HQ.Quota@dhs.gov. An application to participate in the program test must be sent to the CBP port(s) (Attention: Program Coordinator for Quota Preprocessing) where the applicant intends to submit quota entries for preprocessing. Information on CBP port addresses may be obtained from the CBP web site at http://www.cbp.gov (Office Locations).

FOR FURTHER INFORMATION CONTACT: Christine Kegley, Quota Enforcement and Administration, 202-344-2319.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1998, the Bureau of Customs and Border Protection (CBP) published a general notice in the **Federal Register** (63 FR 39929) announcing the limited testing of a new operational procedure regarding the electronic processing of quota-class apparel merchandise. The test, authorized under § 101.9(a), CBP Regulations (19 CFR 101.9(a)), was commenced on September 15, 1998, at two ports. Quota preprocessing permits certain quota entries (merchandise classifiable in chapter 61 or 62 of the Harmonized Tariff Schedule of the United States (HTSUS)) to be filed, reviewed for admissibility, and to have their quota priority and status determined by CBP prior to arrival of the carrier, similar to the method of preliminary review by which non-quota entries are currently processed. The purpose of quota preprocessing is to reduce CBP processing time for qualified quota entries and to expedite the release of the subject merchandise to the importer. To this end, participants in the quota preprocessing test have been allowed to submit quota entries to CBP up to 5 days prior to vessel arrival or after the wheels are up on air shipments. The July 24, 1998, **Federal Register** notice described the new procedure, specified the eligibility and application requirements for participation in the program test, and noted the acts of misconduct for which a participant in the test could be suspended and disqualified from continued participation in the program. The test was scheduled to continue for a six-month period that expired on March 14, 1999.

On March 25, 1999, January 6, 2000, and November 30, 2000, CBP published general notices in the **Federal Register** (64 FR 14499, 65 FR 806, and 65 FR 71356, respectively) that extended the program test through December 31, 2002. These extensions of the test procedure were undertaken so that CBP could further evaluate the effectiveness of the program and determine whether the program test should be expanded to other ports. By a notice published in the **Federal Register** (66 FR 66018) on December 21, 2001, the test was expanded to a selected number of additional ports in order to enable CBP to continue to study the program's effectiveness and determine whether the program should be established nationwide on a permanent basis.

The expansion of the test to the additional 15 ports was determined by the volume of quota lines of apparel merchandise entered at these ports. By a notice published in the **Federal Register** (67 FR 57271) on September 9, 2002, CBP expanded the test to all CBP ports effective as of October 9, 2002, and extended the duration of the program test until December 31, 2004. CBP further extended the duration of the test until December 31, 2006, by a notice published in the **Federal Register** (70 FR 1732) on January 10, 2005.

The duration of the test is now being further extended so that CBP can continue to evaluate the program's effectiveness. Prospective applicants may consult the July 24,1998 and December 21, 2001, **Federal Register** notices for a more detailed discussion of the quota preprocessing program and the September 9, 2002, **Federal Register** notice for eligibility criteria. All requirements and aspects of the quota preprocessing test, as set forth in these notices, continue to apply.

Dated: September 18, 2006

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, September 21, 2006 (71 FR 55205)]

PROPOSED COLLECTION; COMMENT REQUEST

Administrative Rulings

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Administrative Rulings. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 3, 2006, to be assured of consideration.

ADDRESS: Direct all written comments to the Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the

agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Administrative Rulings

OMB Number: 1651–0085

Form Number: N/A

Abstract: This collection is necessary in order for CBP to respond to requests by importers and other interested persons for the issuance of administrative rulings with respect to the interpretation of CBP laws and prospective and current transactions.

Current Actions: There are no changes to the information collection. This submission is to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses/Institutions

Estimated Number of Respondents: 12,200

Estimated Time Per Respondent: 10 hours

Estimated Total Annual Burden Hours: 128,000

Estimated Total Annualized Cost on the Public: N/A

Dated: September 11, 2006

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, September 18, 2006 (71 FR 54674)]

Aircraft/Vessel Report

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Bureau of Customs and Border Protec-

tion (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Aircraft/Vessel Report (Form I–92). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 3, 2006, to be assured of consideration.

ADDRESS: Direct all written comments to the Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Aircraft/Vessel Report

OMB Number: 1651–0102

Form Number: Form I–92

Abstract: The Form I–92 is part of manifest requirements of Sections 231 and 251 of the Immigration and Nationality Act.

Current Actions: There are no changes to the information collection. This submission is to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses

Estimated Number of Responses: 720,000

Estimated Time Per Respondent: 11 minutes

Estimated Total Annual Burden Hours: 129,600

Estimated Total Annualized Cost on the Public: N/A

Dated: September 11, 2006

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, September 18, 2006 (71 FR 54676)]

Application to Establish Centralized Examination Station

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application to Establish Centralized Examination Station. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 3, 2006, to be assured of consideration.

ADDRESS: Direct all written comments to the Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the qualitv, utility, and

clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application to Establish Centralized Examination Station

OMB Number: 1651–0061

Form Number: N/A

Abstract: If a port director decides their port needs one or more Centralized Examination Stations (CES), they solicit applications to operate a CES. The information contained in the application will be used to determine the suitability of the applicant's facility, the fairness of his fee structure, his knowledge of cargo handling operations and his knowledge of CBP procedures.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses, Individuals, Institutions

Estimated Number of Respondents: 50

Estimated Time Per Respondent: 2 hours

Estimated Total Annual Burden Hours: 100

Estimated Total Annualized Cost on the Public: N/A

Dated: September 11, 2006

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, September 18, 2006 (71 FR 54675)]

Delivery Ticket

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Bureau of Customs and Border Protec-

tion (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Delivery Ticket (Form 6043). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 3, 2006, to be assured of consideration.

ADDRESS: Direct all written comments to the Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Delivery Ticket

OMB Number: 1651–0081

Form Number: Form–6043

Abstract: This collection is intended to cover a warehouse proprietor's receipt of transport to the warehouse from custody of the arriving carrier.

Current Actions: There are no changes to the information collection. This submission is to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses/Institutions

Estimated Number of Respondents: 200

Estimated Time Per Respondent: 20 minutes

Estimated Total Annual Burden Hours: 6,600

Estimated Total Annualized Cost on the Public: N/A

Dated: September 11, 2006

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, September 18, 2006 (71 FR 54675)]

Passenger List/Crew List

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Passenger List/Crew List (Form I–418). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before December 3, 2006, to be assured of consideration.

ADDRESS: Direct all written comments to the Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344–1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and

clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Passenger List/Crew List

OMB Number: 1651–0103

Form Number: Form I–418

Abstract: The Form I–418 is used by masters, owners or agents of vessels to comply with the requirements of Sections 231 and 251 of the Immigration and Nationality Act.

Current Actions: There are no changes to the information collection. This submission is to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Businesses

Estimated Number of Responses: 95,000

Estimated Time Per Respondent: 1 hour

Estimated Total Annual Burden Hours: 95,000

Estimated Total Annualized Cost on the Public: N/A

Dated: September 11, 2006

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, September 18, 2006 (71 FR 54674)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, September 20, 2006.

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

Richard F. Chovanec for SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

REVOCATION OF TREATMENT RELATING TO THE CLASSIFICATION OF CERTAIN FASTENER REPAIR KITS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of treatment relating to the classification of certain fastener repair kits.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) is revoking any treatment relating to the classification of certain fastener repair kits previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the Customs Bulletin, Vol. 40, No. 34, on August 16, 2006. No comments were received in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 3, 2006.

FOR FURTHER INFORMATION CONTACT: Karen Greene, Valuation and Special Programs Branch: (202) 562–8838.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin on August 16, 2006, proposing to revoke any treatment previously accorded by CBP relating to the tariff classification of certain fastener repair kits. No comments were received in response to this notice. As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the treatment identified above. No further rulings have been found. Any party involved with substantially identical transactions on the merchandise subject to this notice should have advised CBP during this notice period.

An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

Pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions in accordance with the analysis set forth in Headquarters Ruling Letter (HQ) 563322 (Attachment).

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: September 18, 2006

Monika R. Brenner for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

ATTACHMENT

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 563322
October 26, 2005
CLA–2 RR:CTF:VS 563322 KSG
CATEGORY: Classification

MELVIN S. SCHWECHTER, ESQ.
BRAD BROOKS-RUBIN, ESQ.
LEBOEUF, LAMB, GREENE & MACRAE, LLP
125 West 55th Street
New York, NY 10019–5389

RE: Eligibility for UAFTA Preference for fastener repair kits

DEAR MR. SCHWECHTER and MR. BROOKS-RUBIN:

This is in response to your letters dated July 28, 2005, and September 22, 2005, requesting a binding ruling on behalf of Alcoa Global Fasteners, Inc. ("Alcoa"), as to the classification of certain imported fastener repair kits and whether they would qualify for preferential tariff treatment under the United States-Australia Free Trade Agreement ("UAFTA"). Samples were submitted with your request.

FACTS:

This case includes four (4) fastener repair kits that Alcoa plans to import into the U.S. The kits include a varying number of steel wire inserts, installation tools, and recoil STI taps.

INSERTS

The wire inserts are used in the repair of stripped or damaged internal threads. They are also used to create a stronger thread assembly in original equipment, especially in lighter alloys. The inserts are made of stainless steel and are helically wound, appearing as wound wire coils.

Typically, the inserts are wound by means of a special tool (such as threaded mandrel or collar-type tool) into a specially tapped hole, which is smaller than the outside diameter of the insert. The wire insert is elongated during the installation process and its outside diameter is compressed so that it anchors into the parent material. A fastener, such as a screw, is inserted into the hole. The wire insert serves to secure the screw more tightly and to prevent its thread from stripping.

The inserts are of Australian origin and their value relative to the total value of the kits ranges from 1.7% to 12%. The inserts are stated to be classified in subheading 7318.29 of the Harmonized Tariff Schedule of the United States ("HTSUS").

INSTALLATION TOOL

The tool is used to install the wire inserts. The tool is manufactured from low carbon steel and generally, will work for multiple thread forms and sizes. The tools are of Australian origin and their value relative to the total value of the kits range from 6.8% to 40.3%. The tools are stated to be classified in subheading 8205.59.5560, HTSUS.

TAP

The taps are special taps used to prepare holes for the installation of steel wire inserts. The recoil screw thread insert (STI) taps are manufactured from high speed steel and its general range is 2–56 through 1 1/2″ diameter and equivalent metric sizes. The taps used in the four kits are either from South Korea or the United Kingdom. Their value relative to the total value of the kits ranges from 19.6% to 55.5%. The taps are stated to be classified in subheading 8207.40.3000, HTSUS.

Kit style no. 25606 contains three inserts, one tap from South Korea, and an installation tool.

Kit style no. 33004 contains 40 inserts, 5 installation tools and 5 taps from the U.K.

Kit style no. 33046 contains 36 inserts, one tap from South Korea and one installation tool.

Kit style no. 33060 contains 10 inserts, one tap from the U.K. and one installation tool.

ISSUES:

What is the proper tariff classification of the fastener repair kits?

Whether the imported fastener kits described above are eligible for preferential tariff treatment under the U.S.- Australia FTA.

LAW AND ANALYSIS:

I. Tariff Classification of the Fastener Repair Kits

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI are then applied taken in order. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

In considering the headings eligible for classification of these goods, we note that the components which permit the kits to perform their function fall into three different headings of the HTSUS. For purposes of classification, the packaging is not considered. There is no specific heading that refers to all the components of the kits. Since each of the headings refer to only a part of the article, reference is made to GRI 3 which, pursuant to GRI 2, provides that goods classifiable under two or more headings shall be classified according to the provisions of GRI 3. Although GRI 3(a) provides that the heading with the most specific description shall be preferred to other headings, when two or more headings refer to only a part of the materials or substances contained in mixed or composite goods, the headings are to be considered as equally specific. We find that to be the case with this article so it could not be classified under GRI 3(a).

Next, reference is made to GRI 3(b) which covers mixtures, composite goods consisting of different materials or made up of different components and goods put up in sets for retail sale which cannot be classified by reference to GRI 3(a). GRI 3(b) states that such groupings are to be classified as

if they consisted of the material or component that gives them their essential character. Explanatory Note (EN) Rule 3(b)(VII) lists as factors to help determine the essential character of such goods the nature of the materials or components, their bulk, quantity, weight or value, and the role of the constituent materials or components in relation to the use of the good.

In this case, counsel argues that the steel inserts give the kits their essential character. Counsel contends that the reason a consumer would purchase the kit is for the steel wire inserts that will be used to strengthen and maintain a fastener hole. Counsel contends that although the inserts do not predominate in bulk, weight or value, they perform the kit's indispensable function of repairing fastener holes and predominate in total quantity. Counsel cites to Headquarters Ruling Letter ("HRL") 962307, dated April 9, 2001, and a line of rulings involving pumpkin carving kits which includes HRL 966981, dated March 7, 2005.

HRL 962307 involved an imported setting tool packaged with 100 anchors. Customs noted that recent cases have looked primarily to the role of the constituent materials or components in relation to the use of the goods to determine essential character. Customs concluded in that case that the drop-in anchors performed the "indispensable function" and therefore, imparted the essential character of the set. The anchors in HRL 962307 were solid pieces with an internally threaded chamber. They could be set without the tool provided, although not as easily. The tool was offered more as a marketing incentive to purchase that set of anchors rather than anchors without a tool.

In HRL 966981, the knife was determined to be indispensable to the pumpkin carving set because the knife alone could be used to carry out the purpose of the kit, carving a design into a pumpkin.

However, in this case, the inserts cannot be set without the assistance of the tools although inserts are sold independently of the tools. The taps are needed to prepare the hole in which the inserts will be used. Based on the above, Customs concludes that in this case, the kits have no essential character. The tool, taps and inserts are equally important. Hence, they merit equal consideration. Therefore, reference is made to GRI 3(c).

GRI 3(c) provides that if the set cannot be classified pursuant to GRI 3(a) or (b), it will be classified in the heading that occurs last in numerical order among those that merit equal consideration. Accordingly, in this case, the kit would be classified in subheading 8207.40, HTSUS, which provides for tools for tapping or threading, and parts thereof: with cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium.

II. U.S.- Australia Free Trade Agreement

The U.S.-Australia Free Trade Agreement was signed on May 18, 2004, and entered into force on January 1, 2005, as approved and implemented by the UAFTA Implementation Act, Pub. L. 108–286, 118 Stat. 919 (August 3, 2004), and set forth in General Note 28, HTSUS.

General Note 28(b), HTSUS, provides, in pertinent part:

> For purposes of this note, subject to the provisions of (c), (d), (m) and (n) thereof, a good imported into the customs territory of the United States is eligible for treatment as an originating good of a UAFTA country under the terms of this note only if–

(i) the good is a good wholly obtained or produced entirely in the territory of Australia or of the United States, or both;

(ii) the good was produced entirely in the territory of Australia or of the United States, or both, and–

(A) each of the nonoriginating materials used in the production of the good undergoes an applicable change in tariff classification specified in subdivision (n) of this note;. . . .

Therefore, we must determine whether the fastener repair kits would satisfy the applicable change in tariff classification. The fastener repair kits are classified in subheading 8207.40, HTSUS. The rule set forth in GN 28(n) is:

A change to subheadings 8207.19 through 8207.90 from any other chapter.

In this case, the taps are claimed to be the only nonoriginating materials in the kits. The taps are classified in subheading 8207.40.30, HTSUS, and do not undergo the requisite chapter change required in GN 28(n). Accordingly, the imported fastener repair kits are not eligible for preferential treatment under the U.S.-Australia FTA.

Counsel also argues that the taps should be treated as accessories or tools under GN 28(h). GN 28(h)(i) provides that accessories, spare parts or tools delivered with a good that form part of the good's standard accessories, spare parts or tools shall— (A) be treated as originating goods if the good is an originating good; and (B) be disregarded in determining whether all the nonoriginating materials used in the production of the good undergo the applicable change in tariff classification set out in subdivision (n) of this note. This provision only applies if the accessories, spare parts or tools are not invoiced separately from the good. GN 28(ii)(A).

CBP stated in Headquarters Ruling Letter ("HRL") 966441, dated June 12, 2003, that:

> The term 'accessory' is not defined in either the tariff schedule or the Explanatory Notes. An accessory is generally an article which is not necessary to enable the goods with which it is used to fulfill their intended function. An accessory must be identified as being intended solely or principally for use with a specific article. Accessories are of secondary or subordinate importance, not essential in and of themselves. They must, however, somehow contribute to the effectiveness of the principal article (e.g. facilitate the use or handling of the principal article, widen the range of its uses or improve its operation).

As stated above, the taps are necessary to prepare the holes in which the inserts will be used. Therefore, the taps are not of secondary or subordinate importance. Accordingly, we find that the provisions of GN 28(h) are not applicable to the imported taps.

Furthermore, based on the information presented, the taps represent more than 10% of the adjusted value of the kits so they would not satisfy the de minimis exception set forth in GN 28(e).

HOLDING:

The imported fastener repair kits described above are classified in subheading 8207.40.30 pursuant to GRI 3(c). The fastener repair kits are not eligible for preferential tariff treatment under the U.S.-Australia FTA.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed

without a copy, this ruling should be brought to the attention of the Customs official handling the transaction.

MONIKA R. BRENNER,
Chief,
Valuation & Special Programs Branch.

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN ACRYLIC FILAMENT TOW

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of certain acrylic filament tow.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP") intends to revoke one ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of certain acrylic filament tow. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before November 3, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark of the Trade and Commercial Regulations Branch at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Brian Barulich, Tariff Classification and Marking Branch, at (202) 572–8883.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke one ruling letter relating to the tariff classification of certain acrylic filament tow. Although in this notice CBP is specifically referring to the revocation of New York Ruling Letter ("NY") L84817, dated May 17, 2005 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved with substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY L84817, CBP classified what was described by the requestor of the ruling as "synthetic filament yarn (non-twisted)" in subheading 5402.49.9040, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which provides for: "Synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex: Other yarn, single, untwisted or with a twist not exceeding 50 turns/m: Other: Other, Monofilament; multifilament, untwisted or with twist of less than 5 turns per meter: Other: Other." As a result of the receipt of additional information from the importer of the merchandise and our review of a sample of the merchandise, CBP now recognizes that the merchandise that is the subject of NY L84817 is not synthetic filament yarn, but synthetic filament tow that is correctly classified in subheading 5501.30.0000, HTSUSA, which provides for: "Synthetic filament tow: Acrylic or modacrylic."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY L84817 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter ("HQ") 968128 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: September 7, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY L84817
May 17, 2005
CLA–2–54:RR:NC:N3:351 L84817
CATEGORY: Classification
TARIFF NO.: 5402.49.9040

EUGENE RICCI
PIER INTERNATIONAL
61 Broadway Suite 1115
New York, NY 10006

RE: The tariff classification of acrylic monofilament yarn from Japan

DEAR MR. RICCI:

In your letter dated May 9, 2005, you requested a tariff classification ruling on behalf of your client, Grafil, Inc., of Sacramento, CA.

You have submitted a sample of acrylic monofilament yarn. You state that it will not be put up for retail sale but will be used in the production of carbon fiber for use in such products as fishing rods and tennis rackets.

The applicable subheading for the acrylic monofilament yarn will be 5402.49.9040, Harmonized Tariff Schedule of the United States (HTS), which provides for synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex; other yarn, single, untwisted or with a twist not exceeding 50 turns/m; other; other; monofilament; multifilament, untwisted or with twist of less than 5 turns per meter; other; other. The general rate of duty will be eight percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mitchel Bayer at 646–733–3102.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 968128
CLA–2 RR:CTF:TCM 968128 BtB
CATEGORY: Classification
TARIFF NO.: 5501.30.0000

EUGENE RICCI
PIER INTERNATIONAL
61 Broadway
Suite 1115
New York, NY 10006

Re: Classification of acrylic filament tow from Japan; revocation of NY L84817

DEAR MR. RICCI:

On May 17, 2005, U.S. Customs and Border Protection ("CBP") issued New York Ruling Letter ("NY") L84817 to you, on behalf of Grafil, Inc. In NY L84817, CBP classified what you described in your request as "synthetic filament yarn (non-twisted)" in subheading 5402.49.9040, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which provides for: "Synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex: Other yarn, single, untwisted or with a twist not exceeding 50 turns/m: Other: Other, Monofilament; multifilament, untwisted or with twist of less than 5 turns per meter: Other: Other."

We have recently recognized that the merchandise that is the subject of NY L84817 is not synthetic filament yarn, but synthetic filament tow. Consequently, this ruling, Headquarters Ruling ("HQ") 968128, revokes NY L84817 and provides the correct classification of the synthetic filament tow at issue.

We note that CBP issued a separate ruling (NY L89976) directly to Grafil, Inc. on January 27, 2006, on the classification of acrylic filament tow. We believe that the tow that is the subject of NY L89976 is identical to the tow that is the subject of NY L84817 and, in turn, this ruling letter. The holding of this ruling letter corresponds with the holding of NY L89976.

FACTS:

NY L84817 provides the following very limited details about the merchandise at issue:

> You have submitted a sample of acrylic monofilament yarn. You state that it will not be put up for retail sale but will be used in the production of carbon fiber for use in such products as fishing rods and tennis rackets.

After issuance of NY L84817, CBP retained the sample noted in the quotation above. During the preparation of NY L89976, Grafil, Inc. provided the following additional information to CBP regarding the merchandise at issue (referred to below as "tow"):

> . . . the tow exceeds 2 meters in length (it is greater than 50,000 meters); it has fewer than 5 twists per meter (it is not twisted); it measures less than 67 decitex per filament (each filament is between 1.0 and 1.3 decitex); the tow cannot be stretched by more than twice its length (it cannot be stretched to more than 10% of its length); and the total measurement of the sample tow is more than 20,000 decitex (the total is between 24,000 and 31,000).

Additionally, Grafil, Inc. informed us that the tow at issue would not be resold in this [tow] form, but would be carbonized to form carbon fiber, which would then be used in products such as golf club shafts, bows and arrows, bicycle frames, and aerospace applications. We also note that the tow at issue consists of parallel filaments of uniform length equal to the length of the tow. The tow is made in Japan.

As a result of the additional information from Grafil, Inc. (obtained after the issuance of NY L84817) and our recent re-review of the sample, it is now clear that the merchandise at issue was incorrectly classified in NY L84817.

ISSUE:

What is the classification of the article at issue?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation ("GRI"). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." If the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN") constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subhead-

ings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Note 1 to Chapter 55, HTSUSA, states that

> Headings 5501 and 5502 apply only to man-made filament tow, consisting of parallel filaments of a uniform length equal to the length of the tow, meeting the following specifications:
>
> (a) Length of tow exceeding 2 m;
> (b) Twist less than 5 turns per meter;
> (c) Measuring per filament less than 67 decitex;
> (d) Synthetic filament tow only: the tow must be drawn, that is to say, be incapable of being stretched by more than 100 percent of its length; and
> (e) Total measurement of tow more than 20,000 decitex.

The article at issue consists of parallel filaments of uniform length equal to the length of the tow. The article also satisfies the other requirements of Note 1 to Chapter 55, HTSUSA, listed above. As a result, we find that the article is provided for by heading 5501, HTSUSA, which provides for synthetic filament tow, and was incorrectly classified as synthetic filament yarn in NY L84817. As the tow at issue is acrylic, it is specifically provided for by 5501.30.0000, HTSUSA, which provides for: "Synthetic filament tow: Acrylic or modacrylic."

HOLDING:

The article at issue is classified in subheading 5501.30.0000, HTSUSA, which provides for: "Synthetic filament tow: Acrylic or modacrylic." The applicable column one (general) duty rate for the merchandise under the 2006 HTSUSA is 7.5% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUSA and the accompanying duty rates are provided on the world wide web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY L84817, dated May 17, 2005, is hereby revoked.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN CUT-TO-LENGTH INSULATED WIRE WITH CONNECTORS AND TERMINALS SUBASSEMBLIES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of ruling letter and revocation of treatment relating to the classification of certain cut-to-length insulated wire with connectors and terminals.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182,107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain cut-to-length insulated wire with connectors and terminals. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before November 3, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark, Trade and Commercial Regulations Branch, at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Tariff Classification and Marking Branch, at (202) 572–8828.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section

484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify a ruling letter relating to the tariff classification of certain cut-to-length insulated wire with connectors and terminals. Although in this notice CBP is specifically referring to the modification of New York Ruling Letter (NY) L85665, dated July 12, 2005 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the rulings identified above. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved with substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY L85665 CBP classified certain cut-to-length insulated wire with connectors and terminals in subheading 8544.30.0000, HTSUSA, which provides for, *inter alia*: "Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; . . . : Ignition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships", using a GRI 2(a) essential character analysis. Based on our recent review of NY L85665, we have determined that although the classification of the cut-to-length insulated wire with connectors and terminals in subheading 8544.30.0000, HTSUSA, is correct, the GRI 2(a) analysis on which this classification is based is not correct. It is now CBP's position that the proper legal analysis for classification of the merchandise in subheading 8544.30.0000, HTSUSA, is based on the application of GRI 1.

Pursuant to 19 U.S.C. §1625(c)(1), CBP intends to modify NY L85665 and any other ruling not specifically identified to reflect the

proper legal analysis set forth in proposed Headquarters Ruling Letter (HQ) 967801 (Attachment B). Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: September 15, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY L85665
July 12, 2005
CLA–2–85:RR:NC:N1:112 L85665
CATEGORY: Classification
TARIFF NO.: 8544.30.0000

PAULA S. SMITH
COUNSEL FOR ALCOA FUJIKURA LTD.
LEBOEUF, LAMB, GREENE & MACRAE, L.L.P.
1875 Connecticut Ave., N.W. Suite 1200
Washington, D.C. 20009–5728

RE: The tariff classification of automotive wiring harness subassemblies from Honduras

DEAR MS. SMITH:

In your letter dated June 2, 2005, you requested a tariff classification ruling on behalf of Alcoa Fujikura Ltd..

The items consist of cut-to-length insulated wires connected together by terminals on one or both ends and have at least one attached connector.

The purpose of the wires is to serve as subassemblies of automotive wiring harnesses.

You propose classification of these items in subheading 8544.41.8000 of the Harmonized Tariff Schedule of the United States (HTS). Classification of merchandise in the HTS is governed by the General Rules of Interpretation (GRIs):

GRI 1. states, " . . . classification shall be determined according to the terms of the headings . . . ". HTS heading 8544 provides for "Insulated . . . wire, whether or not fitted with connectors . . . ".

General Note 3. (h) (vi) states, " . . . a reference to "headings" encompasses subheadings indented thereunder.".

GRI 2. (a) states, " Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that,

as entered, the incomplete or unfinished article has the essential character of the complete or finished article.". HTS subheading 8544.30.0000 provides for "... other wiring sets of a kind used in vehicles ...". The Merriam-Webster Dictionary defines "set" as, "a number of things of the same kind that belong together or are so used ". Since the subassemblies in question physically have the essential character of wiring sets and are to be used in vehicles, this subheading is appropriate.

The applicable subheading for the Automotive Wiring Harness Subassemblies will be 8544.30.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for "Insulated ... wire ..., whether or not fitted with connectors ...: ... other wiring sets of a kind used in vehicles ...". The rate of duty will be 5%.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Richard Laman at 646–733–3017.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967801
CLA–2 RR:CTF:TCM 967801 HkP
CATEGORY: Classification
TARIFF NO.: 8544.30.0000

MELVIN S. SCHWECHTER, ESQ.
PAULA S. SMITH, ESQ.
LEBOEUF, LAMB, GREENE & MACRAE, LLP
1875 Connecticut Avenue, NW
Suite 1200
Washington, DC 20009

RE: Modification of NY L85665; cut-to-length insulated wire with connectors and terminals

DEAR MR. SCHWECHTER & MS. SMITH:

This is in reference to your letter dated August 23, 2005, requesting reconsideration of New York Ruling Letter ("NY") L85665, issued to you on July 12, 2005, on behalf of your client Alcoa Fujikura Ltd. ("AFL"), in which the tariff classification of certain types of cut-to-length insulated wire with connectors and terminals subassemblies (the "subassemblies") were determined under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). U.S. Customs and Border Protection ("CBP"), using a GRI 2(a) analysis, classified the subassemblies in subheading 8544.30.0000, HTSUSA, as articles having the essential character of wiring sets and other

wiring sets of a kind used in vehicles, aircraft or ships. You contend that the subassemblies are properly classified in subheading 8544.41.8000, HTSUSA, as other electrical conductors for a voltage not exceeding 80V. For the reasons set forth below, we hereby modify NY L85665.

FACTS:

The subject subassemblies consist of cut-to-length insulated wire (ranging in number from 2 to 50) joined with at least one connector and with terminals on one or both ends of each wire and will be imported from Honduras. Some models of subassemblies also contain clips, retainers, light bulbs, brackets, corrugated plastic tubing and/or tape. We were informed that in all cases the insulated wire is of a voltage not exceeding 80V. These subassemblies will be used in the manufacture of automobile wiring harnesses.

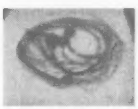
CBP was informed that, after importation into the United States the subassemblies will undergo finishing operations, including routing, splicing, twisting, taping, and inserting additional connectors or terminals where required. Clips, brackets, relays and/or fuses may also be added. The subassemblies will then be known as "modules." Each module will be assembled with other Honduran subassemblies imported and converted into modules to form a complete and finished wiring harness. However, in no case will all of the subassemblies needed to complete a finished wiring harness be imported together. Each wiring harness will be dedicated for use in a particular model of automobile.

We were also told that, with respect to the majority of the types of subassemblies, the circuits contained in each subassembly are not dedicated for use in a particular electrical system of an automobile. Rather, the subassemblies contain circuits assigned to a variety of the vehicle's electrical systems. For example, some of the circuits on one subassembly may be dedicated for use in the air conditioning unit, others for the CD player, and others for the sunroof of a vehicle. However, we note that all of the samples provided for our consideration are dedicated to a particular use.

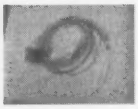
There are nine subassemblies under consideration. Samples have been provided of seven types of subassemblies. The samples are identified in Exhibit D by model number as follows:

(1) 1J1 970 039 – *modulo radiador* (radiator module)
(2) 1J1 970 043 – *modulo faros* (headlight module)
(3) 1J1 970 083 – *mod. tanque de combustible* (fuel tank module)
(4) 1J1 970 126 – *mod. cinturones* (security system module)
(5) 1J5 970 149 – *arnes tanque de combustible* (fuel tank harness)
(6) 1J1 970 076 – *arnes bocina* (speaker harness)
(7) 1J1 970 016 – *modulo de radio* (radio module)

These photographs are included as representative of the items under consideration:



Sample 1 – radiator module



Sample 7 – radio module

You have provided us with photographs of model numbers: (8) 1K5 970 113, which is for an undetermined use, and (9) 1K5 970 091, which is identified in Exhibit E as a *"bocinas"*, a speaker assembly.

ISSUE:

Whether the subject subassemblies are wiring sets of subheading 8544.30, HTSUS.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions under consideration are as follows:

8544	Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; . . . :
	* * *
8544.30.0000	Ignition wiring sets and other wiring sets of a kind used in vehicles, aircraft or ships . . . . .
	Other electric conductors, for a voltage not exceeding 80V:
8544.41	Fitted with connectors:
	* * *
8544.41.8000	Other . . . . .

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the HTSUS. While not legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

Heading 8544, HTSUS, provides for, *inter alia*: "Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors." EN 85.44 explains that the goods of heading 8544, HTSUS, are made up of (A) a conductor, (B) one or more coverings of insulating material, (C) in certain cases, a metal sheath, and (D) sometimes a metal armouring. Because the subject subassemblies are made up of conductors (*i.e.*, wire) and one or more cover-

ings of insulating material, we find that they are properly classified in heading 8544, HTSUS. CBP has consistently found that the main function of articles of heading 8544, HTSUS, is the conduction of electricity.

Classification must therefore take place at the subheading level. GRI 6 provides that the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

You argue that the subject subassemblies are not "wiring sets" of subheading 8544.30.00, HTSUS, because they do not, in their condition as imported, meet the definition of "wiring sets" as used in that subheading and are therefore not specifically described by its terms. You state that all of the subassemblies have incomplete connections and are incapable of functioning by themselves without being assembled with up to 49 other modules to form a completed wiring harness. You further state that incomplete wiring sets are not classifiable in subheading 8544.30.0000, HTSUSA. You contend that AFL's subassemblies are properly classified in subheading 8544.41.8000, HTSUSA, as other electrical conductors, for a voltage not exceeding 80 V, fitted with connectors.

As an initial matter, we agree that unfinished wiring sets cannot be classified in subheading 8544.30.0000, HTSUSA, because the terms of the subheading make it clear that articles classified therein must constitute a "set". CBP erred in NY L85665 when it applied a GRI 2(a) essential character analysis to wiring sets.

As you have stated, the term "wiring sets" is not defined in the tariff. EN 85.44 merely provides an example of a wiring set, stating that heading 8544, HTSUS, "includes wire, etc. of the types described above made up in sets (e.g., multiple cables for connecting motor vehicle sparking plugs to the distributor)." You argue that this language indicates that "sets" may include more than one cable, and that a "wiring set" should perform a discrete specific function in a vehicle. However, we note that ENs are not dispositive or legally binding. In support of your position, you cite ITT Thompson Industries, Inc., v. United States ("ITT Industries"), 537 F. Supp. 1272 (citations omitted) (1982). In that case the court noted, "there is no patterned commercial definition of the term 'wiring sets'." On consulting a dictionary, the court found that "wiring" meant, *inter alia*, "an arrangement of wires used for electric distribution", and that "sets" meant, *inter alia*, "an apparatus of electrical or electronic components assembled so as to function as a unit (radio set, television set, amplifying set, sending set)." The court concluded, "It is apparent from these definitions and related examples that a 'set' must be capable of performing a specific function by itself without assistance from an outside source." The court went on to find that "a conclusion that the harnesses do not constitute a wiring set designed for use in motor vehicles would be directly in contrast to the visual samples as well as the weight of the overall evidence." At 1280. Yet, despite concluding that a set must be capable of performing a specific function without assistance, the court also found that the harnesses constituted only parts of either electric lighting equipment designed for motor vehicles, or only parts of other sound or visual signaling apparatus because, "[t]he harnesses, standing alone, cannot produce actual illumination nor can they produce an actual sound or visual signal. They are only parts of those respective systems." At 1281.

Decisions by the courts interpreting nomenclature under the HTSUS' predecessor tariff code, the Tariff Schedules of the United States ("TSUS"), are not deemed dispositive under the HTSUS. However, on a case-by-case basis, such decisions should be deemed instructive in interpreting the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTS. Omnibus Trade and Competitiveness Act of 1988, Public Law 100–418, August 23, 1988, 102 Stat. 1107, 1147; H.R. Rep. No. 576, 100th Cong., 2d Sess. 549–550 (1988); 1988 U.S.C.C.A.N. 1547, 1582–1583. In this instance, we find that the definition of wiring sets found in ITT Industries is not helpful because of the inherent conflict that exists within that definition.

A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meaning. Nippon Kogaku (USA) Inc. v. United States, 69 CCPA 89, 673 F.2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. C.J. Tower & Sons v. United States, 69 CCPA 128, 673 F.2d 1268 (1982). The online Oxford English Dictionary (www.askoxford.com) defines "wiring" as "a system of wires providing electric circuits for a device or building", and "set" as "a number of things or people grouped together as similar or forming a unit." Taken together, we consider the common and commercial meaning of "wiring set" to be a system of wires, grouped together to form a unit, to provide electric circuits for an automobile.

Your argument for classification in subheading 8544.41.8000, HTSUSA, appears to be based, in part, on the notion that only wiring harnesses, as defined by you, are properly classified in subheading 8544.30.0000, HTSUSA. Based on your description of the production process, a wiring harness is formed only after several subassemblies are converted into "modules" and then several modules are assembled into a wiring harness. Anything less must be classified in subheading 8544.41, HTSUSA. We call your attention to the fact that subheading 8544.30.0000, HSTUSA, is an *eo nomine* provision for wiring sets; "harness" is not a part of the language of the provision. However, because *eo nomine* provisions normally include all forms of the article, and because wiring harnesses are within the terms of heading 8544, HTSUS, as explained by the ENs they have a conductor and one or more coverings of insulated material, then insulated wiring sets, such as wiring harnesses, are classified in subheading 8544.30.0000, HTSUSA, as if provided for by name. Indeed, this was the finding of the court in ITT Industries. Similarly, any other article that falls within the terms of the subheading are classified there as if provided for by name. A wiring harness is simply "the major assembly of a vehicle's electrical system" usually bundled together in a loom or assembly, and more generally, a "harness" is "a group of electrical conductors laced or bundled in a given configuration, usually with several breakouts." (www.autoglossary.com.) Based on these definitions, we find it possible that both a harness and a wiring harness are sets of subheading 8544.30.0000, HSTUSA. In fact, the language of the subheading, "ignition wiring sets" (a group of electrical conductors in a given configuration) and "other wiring sets" (an assembly of a vehicle's electrical system), appears to aid such an interpretation.

With regard to the issue of whether or not a set is required to have connectors, we are aided by the rules of construction, which instruct that a sub-

heading is subordinate to the terms of its superior heading. Heading 8544, HSTUS, provides for insulated wire, cable and other electric conductors, "whether or not fitted with connectors". Generally, an electrical connector joins electrical circuits together. A search on the Internet for "electrical connector" revealed that there are many types of connectors, broadly classified in five groups: terminal blocks, crimp-on terminals, insulation displacement connectors, plug and socket connectors, and component and device connectors. In automotive terms, a "harness connector" is "an electrical connector at the end of a wire or harness used to connect the conductor to a device or system." (www.autoglossary.com.) Subheading 8544.30.0000, HTSUSA, provides for ignition wiring sets and other wiring sets of a kind used in vehicles. When read in the context of heading 8544, HTSUS, it becomes clear that this subheading includes wiring sets *whether or not* fitted with connectors. Note the difference between this subheading and subheading 8544.41.8000, HTSUSA, which specifically includes the optional limiting language found in heading 8544, HTSUS: "fitted with connectors." *See* **HQ 966989**, dated Feb. 10, 2005, stating CBP's position on the relationship of subheadings to headings under the tariff. Based on the foregoing, we find that wiring sets of subheading 8544.30.0000, HTSUSA, need not be fitted with connectors.

You have told us that after importation the subassemblies may be routed, spliced, twisted, taped, and have additional connectors or terminals inserted, and that clips, brackets, relays and/or fuses may also be added. You have also said that after this additional assembly operation, the module, as it is now called, must be further assembled with other modules in order to form a complete wiring harness. It is for these reasons that you argue these imports are not sets classifiable under subheading 8544.30.0000, HTSUSA. However, EN 85.44 explains, "[p]rovided they are insulated, . . . heading [8544] covers electric wire, cable and other conductors (e.g. braids, strip, bars) used as conductors in electrical machinery, apparatus or installations." CBP has previously found that the only requirement for classification in subheading 8544.30.0000, HTSUSA, is that the insulated wires or other electrical conductors be in sets. *See* **HQ 955026**, dated September 27, 1993, and **HQ 958653**, dated April 15, 1996. *See also* **HQ 088477**, dated May 9, 1991, and **HQ 959173**, dated September 10, 1996. Therefore, once the subject subassemblies (which are imported in sets) are capable of conducting electricity, then even if they are not routed, spliced, twisted, taped, and do not have additional connectors or terminals inserted, or clips, brackets, relays and/or fuses added, or other additions not required for conducting electricity, they are classified in subheading 8544.30.0000, HTSUSA. In the present case, we find that none of the items added in the post-importation assembly stage is essential for conducting electricity, even though they may aid in the proper management of such electricity. Consequently, we find that the lack of these additional components on importation does not preclude the subassemblies from being classified in subheading 8544.30.0000, HTSUSA.

It is your belief that a wiring set must be capable of performing a specific function by itself without assistance from an outside source. You argue that the subassemblies under consideration do not materially resemble the automotive wire harness assemblies typically classified under subheading 8544.30.0000, HTSUSA. You state that CBP has classified wiring harnesses or wiring harness assemblies dedicated to a specific function in this subheading. You also state that an AFL subassembly may contain many differ-

ent types of circuits, such as for headlights, air conditioning, and an alarm system, and therefore will perform multiple rather than a specific function within an automobile. You argue that because the subassemblies will not perform a specific function, they are not wiring harnesses and therefore cannot be classified in subheading 8544.30.0000, HTSUSA. However, we note that the samples you have provided to us as representative of your imports are all each dedicated to a specific function.

We believe that your reasoning indicates a misperception of the function of a wiring harness as the major assembly of a vehicle's electrical system. By its nature, such an assembly contains circuits assigned to different components of a vehicle, but its specific function is to conduct electricity throughout the vehicle. The court has found such articles provided for in subheading 8544.30.0000, HTSUSA. *See* ITT Industries. As we have previously stated, it is our position that wiring sets, whether assigned to one or many of a vehicle's components, are classified in subheading 8544.30.0000, HTSUSA. As we have consistently ruled, the unifying characteristic of wiring sets of subheading 8544.30.0000, HTSUSA, is that their main function is to control the flow of electricity. We refer your attention to **HQ 958653**, dated April 15, 1996, in which we classified circuitry for most of a car's engine control elements (sensors, fuel injectors, ignition control, air conditioning, clutch coil control, idle speed control, exhaust gas recirculation solenoid control, alternator and battery, oil pressure sensor, water temperature control, radio noise suppression, and some steering components) in subheading 8544.30.0000, HTSUSA. In **HQ 955026** (September 27, 1993) we classified an instrument panel assembly, the main function of which is to interface between the body computer, instrument cluster, radio, air bag module, I/P switches, body wiring, engine compartment wiring, and all other modules in the panel, in subheading 8544.30.0000, HTSUSA. *cf* **HQ 962623**, dated July 22, 1999, and **HQ 958653**, dated April 15, 1996. AFL's subassemblies are imported as sets, that is, as wires grouped together to form a unit, either by being taped together, or by being housed together in plastic casing, or fitted together with connecters, and are used to conduct electricity within an automobile. They are substantially similar to articles classified in subheading 8544.30.0000, HTSUSA, in previous CBP rulings.

Finally, we consider your argument that wiring sets of subheading 8544.30.0000, HTSUSA, must conform to the characteristics of other "set" provisions found elsewhere in the tariff. Those other provisions require that the subject items be imported packaged together for retail sale without repacking. However, subheading 8544.30.0000, HTSUSA, specifically provides that a wiring set need not have connectors in order to be considered a set, even though connectors are needed for the set to function as intended. Because the tariff implicitly recognizes that the wiring sets of subheading 8544.30.0000, HTSUSA, may require further assembly, we find that these wiring sets are distinguished from other sets provided for in the tariff.

HOLDING:

By application of GRI 1 we find that the AFL subassemblies are provided for in heading 8544, HTSUS, which provides for: "Insulated (including enameled or anodized) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors," and are specifically provided for in subheading 8544.30.0000, HTSUSA, which provides for: "Ignition wiring sets and other wiring sets of a kind used in vehicles."

EFFECT ON OTHER RULINGS:

NY L85665, dated July 12, 2005, is hereby modified with respect to its legal analysis. The classification of the items described therein is unchanged.

MYLES B. HARMON,
Director,
Commercial & Trade Facilitation Division.

REVOCATION OF A RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF AN AUDIO VISUAL LAPTOP

AGENCY: Bureau of Customs and Border Protection; Department of Homeland Security.

ACTION: Revocation of a tariff classification ruling letter and revocation of treatment relating to the classification of an audio visual laptop.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), this notice advises interested parties that the Bureau of Customs and Border Protection (CBP) is revoking a ruling letter relating to the tariff classification of an audio visual laptop under the Harmonized Tariff Schedule of the United States (HTSUS). CBP is also revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed action was published on July 12, 2006, in Volume 40, Number 29, of the CUSTOMS BULLETIN. CBP received no comments in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 3, 2006.

FOR FURTHER INFORMATION CONTACT: Kelly Herman, Tariff Classification and Marking Branch: (202) 572–8713.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal

obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, notice advising interested parties that CBP is revoking one ruling letter (NY K88339) pertaining to the tariff classification of an audio visual laptop was published in the July 12, 2006, CUSTOMS BULLETIN, Volume 40, Number 29. No comments were received in response to the notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY K88339, CBP ruled that the Qosimo AV Notebook PC E15 was classified in heading 8528, HTSUS, which provides for: "Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors."

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking NY K88339 and is revoking or modifying any other ruling not specifically identified, to reflect the proper classification of audio visual laptops according to the analysis contained in Headquarters Ruling Letters (HQ) 967655, set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: September 15, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967655
September 15, 2006
CLA–2 RR: CTF:TCM 967655 KSH
CATEGORY: Classification
TARIFF NO.: 8471.30.0000

MR. JOEL WINNICK, ESQ.
MS. TERRY POLINO, ESQ.
HOGAN & HARTSON, LLP
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004–1109

RE: Revocation of New York Ruling Letter (NY) K88339, dated August 17, 2004; Classification of an Audio/Video Laptop.

DEAR MR. WINNICK and MS. POLINO:

This is in response to your letter of April 1, 2005, on behalf of your client Toshiba America Information Systems, Inc. (TAIS), in which you request reconsideration of New York Ruling Letter (NY) K88339, issued on August 17, 2004, concerning the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of the Qosmio AV Notebook PC E15 (Qosmio). The Qosmio was classified in heading 8528, HTSUS, which provides for: "Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors." We regret the delay in responding.

In your request for reconsideration, you have advised us that the Qosmio's audio visual function requires the user to turn on the computer and is fully dependent upon the PC's operating systems. You have also stated that the Qosmio has the general characteristics of an automatic data processing (ADP) machine, the purchaser of the Qosmio expects to principally be buying an ADP machine, the Qosmio is designed, manufactured, marketed and sold in a channel of trade and an environment of sale devoted to ADP machines and it is used principally by consumers as an ADP machine. Accordingly, you argue that the principal function of the Qosmio is as an ADP machine that should be classified in heading 8471, HTSUS, which provides for: "Automatic data processing machines and units thereof . . .". In accordance with your request for reconsideration of NY K88339 and in light of this newly submitted information, including information submitted in conjunction with the meeting held with members of my staff on January 27, 2006, the Bureau of Customs and Border Protection (CBP) has reviewed the classification of this item and has determined that the cited ruling is in error.

Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY K88339 was published in the Customs Bulletin, Vol. 40, No. 29, on July 12, 2006. No comments were received in response to the notice.

FACTS:

The Qosmio is a clamshell-configured notebook computer which measures 13.31″ by 11.22″ by 1.70″ and weighs approximately 8.2 lbs. The Qosmio contains the following core hardware and software components:

80GB Hard Disk Drive
512 MB RAM
Intel Pentium M Processor 735
Intel 855PM System Chipset
Microsoft XP Media Center Edition Operating System
15″ XGA TruBrite Display
CD/DVD
NVIDIA GeForce FX Go5200 Graphics
Harmon/Kardon premium stereo speakers
Four USB 2.0 Ports
Integrated V.92 Modem, 10/100 Ethernet
Keyboard and touchpad
Parallel Linux Operating System
Wireless LAN B and G
Bluetooth Enabled
Surround Sound
Bridge Media Adapter
DVD
S-video input and output for DVR, DVD and other video applications
i.Link for high speed communications
Analog TV tuner

The audio visual features of the Qosmio may be employed through either of the Qosmio's two operating systems (Windows XP Media Center Edition and Linux). However, users who do not need to simultaneously run the audio visual features and perform data processing functions controlled by the Windows XP Media Center may chose to exclusively run the Linux operating system. Two separate power buttons allow the user to choose either the TV or computer features.

If the TV power button is used, the data stream is picked up by the ADP peripheral interconnect bus and is transferred through the ADP system bus to the ADP processor and memory. Stated another way, the TV cannot function without the ADP hardware. Its electrical and logical functions are directed through the ADP machine.

ISSUE:

Whether the Qosmio is classified in heading 8528, HTSUS, as reception apparatus for television or in heading 8471, HTSUS, as an automatic data processing machine.

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of

goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUS and are thus useful in ascertaining the classification of merchandise under the Harmonized System. CBP believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

8471	Automatic data processing machines and units thereof:
8471.30.00	Portable digital automatic data processing machines, weighing not more than 10 kg, consisting of at least a central processing unit, a keyboard and a display
8528	Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors:
	Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus:
8528.12	Color:
	With a flat panel screen:
	Other:
8528.12.7201	Other."

Note 5(A) to chapter 84, HTSUS, defines the term "automatic data processing machines" for the purposes of heading 8471 as digital machines which must be capable of (1) storing the processing program or programs and at least the data immediately necessary for execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

Pursuant to Note 5(A)(a), the Qosmio *prima facie* meets the terms of Heading 8471, HTSUS, as an ADP machine. However, it is also capable of displaying a variety of tv signals and other audio visual information which is provided for, *eo nomine*, under heading 8528, HTSUS, as reception apparatus for television.

The Qosmio is therefore considered a composite machine that has the functions of both an ADP machine and a reception apparatus for television. Classification of composite machines is regulated by Note 3 to Section XVI, HTSUS, which provides that:

> Unless the content otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

It is the principal use of the class or kind of goods to which the imports belong at or immediately prior to the time of importation and not the principal use of the specific import that is controlling under the General Rules of Interpretation. *See* Group Italglass U.S.A., Inc. v. United States, 17 C.I.T. 1177, 1177, 839 F. Supp. 866, 867 (1993)

The courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: (1) general physical characteristics; (2) expectation of the ultimate purchaser; (3) channels of trade; (4) environment of sale (accompanying accessories, manner of advertisement and display); and (5) usage of the merchandise. *See* Lenox Collections v. U.S., 20 CIT 194, 196 (1996). *See also* U.S. v. Carborundum Co., 63 CCPA 98, 102, 536 F. 2d 373, 377 (1976), *cert denied*, 429 U.S. 979 (1976); Kraft, Inc. v. U.S., 16 CIT 483, 489 (1992); and G. Heileman Brewing Co. v. U.S., 14 CIT 614, 620 (1990).

In considering these factors, we note that the 15 inch screen size, screen resolution of 1024 by 768, standard 84 key keyboard and touch pad, USB and i.Link ports, hard drive and clamshell configuration are consistent with the general physical characteristics of an ADP machine. In this regard, we note that the Qosmio is not an ADP unit but is a complete, integrated ADP machine. (Cf. the classification opinion by World Customs Organization (WCO), Harmonized System Committee (HSC), at its 19th Session to classify a multimedia personal computer system consisting of three separately housed units: a 14″ (35 cm) colour television receiver (display) with a digital processing unit, a keyboard (input unit), and an infra-red remote control device in subheading 8471.49, HTS, and NY K82971, dated February 26, 2004, in which a Gateway 610 Media Center PC desktop computer system with integrated TV tuner card was classified in subheading 8471.49.1095, HTSUS.

The TV tuner and ADP are not two separate machines. Rather, the TV function is dependent on the ADP hardware. Even when the TV is in use the Intel Pentium M Processor 735, Intel 855PM chipset and memory chips are ADP hardware that must be used.

Probative evidence included in your submission indicates that consumers are primarily purchasing the Qosmio for its ADP functions with ancillary interest in the audio visual functions. The Qosmio is marketed and sold in channels of trade for ADP machines. The Qosmio is sold in the ADP departments of consumer electronic retailers and are advertised as such. The Qosmio is also sold to retailers who primarily sell ADP equipment and software. Further, evidence has been submitted that the overwhelming majority of purchasers use the Qosmio for its data processing functions while few regularly use the Qosmio to watch television.

Based on the Carborundum factors and the information above, we find that the principal function of the Qosmio is an ADP machine of heading 8471, HTSUS.

HOLDING:

By application of GRI 1 and Note 3 to Section XVI, the Qosmio is classified in heading 8471, HTSUS. It is specifically provided for in subheading 8471.30.0000, HTSUS, which provides for: "Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included: Portable digital automatic data processing machines, weighing not more than 10kg, consisting of at least a central processing unit, a keyboard and a display." The column one, general rate of duty is free.

EFFECT ON OTHER RULINGS:

NY K88339, dated August 17, 2004, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Slip Op. 06–131

Before: Judge Judith M. Barzilay

CLEO INC, CRYSTAL CREATIVE PRODUCTS, INC., and TARGET CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and SEAMAN PAPER COMPANY OF MASSACHUSETTS, INC., Defendant-Intervenor.

Consol. Court No. 05–00336
Public Version

[Plaintiffs' Motions for Judgment on Agency Record denied.]

Decided: August 31, 2006

Blank Rome, LLP (*Frederick L. Ikenson*), *Larry Hampel*, and *Roberta K. Daghir*, for Plaintiffs Cleo Inc, and Crystal Creative Products, Inc.

Mayer, Brown, Rowe & Maw, LLP (*Marguerite E. Trossevin*), *Kristy L. Balsanek*, and *James J. Jochum*, for Plaintiff Target Corporation.

Michael D. Panzera, U.S. Department of Justice, Commercial Litigation Branch, Civil Division; (*Mark B. Rees*, *Neal J. Reynolds*, and *James M. Lyons*), U.S. International Trade Commission, Office of the General Counsel, for Defendant.

Collier, Shannon, Scott, PLLC (*Adam H. Gordon* and *Kathleen W. Cannon*), for Defendant-Intervenor.

OPINION

BARZILAY, JUDGE: This action is before the court on Plaintiffs' motions for judgment on the agency record pursuant to USCIT Rule 56.2. The parties contest a final material injury determination issued by an evenly divided United States International Trade Commission ("ITC" or "Commission"), which found an industry in the United States materially injured by reason of imports of certain tissue paper products from the People's Republic of China ("China") already determined by the Department of Commerce ("Commerce") to have been sold at less than fair value ("LTFV") in the United States. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). For the reasons set forth below, the court upholds the ITC's determination.

BACKGROUND

This case arises from an ITC investigation instituted on February 17, 2004, by petitioners Seaman Paper Company of Massachusetts, Inc. ("Seaman" or "Defendant-Intervenor"), American Crepe Corporation ("American Crepe"), Eagle Tissue LLC ("Eagle Tissue"), Flower City Tissue Mills Co. ("Flower City"), Garlock Printing & Converting, Inc. ("Garlock Printing"), Paper Service, Ltd., Putney Paper Co., Ltd., and the Paper, Allied-Industrial, Chemical and Energy Workers International Union AFL–CIO, CLC. *See Certain Tissue Paper Products and Crepe Paper Products from China*, 69 Fed. Reg. 8232–01 (Feb. 23, 2004) (initiation notice (prelim.)). The petitioners alleged that domestic industries producing tissue paper and crepe paper were materially injured by reason of dumped imports of tissue paper and crepe paper from China. P.D. 1.[1]

In April 2004, the ITC made an affirmative material injury determination in the preliminary phase of its injury investigation. *Certain Tissue Paper Products and Crepe Paper Products From China*, 69 Fed. Reg. 20,037 (Apr. 15, 2004), P.D. 62A. It found that there were two domestic like products – tissue paper and crepe paper – and performed separate injury analyses for the industries producing these products. *See Certain Tissue Paper Products and Crepe Paper Products from China*, Inv. No. 731–TA–1070 (Preliminary), USITC Pub. 3682 (Apr. 2004), P.D. 70. After the ITC made its preliminary injury determinations, Commerce issued final affirmative LTFV determinations for crepe paper and tissue paper from China on December 3, 2004 and February 14, 2005, respectively. *Notice of Final Determination of Sales at LTFV and Affirmative Final Determination of Critical Circumstances: Certain Crepe Paper from the People's Republic of China*, 69 Fed. Reg. 70,233–01 (Dec. 3, 2004); *Notice of Final Determination of Sales at LTFV: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 7475 (Feb. 14, 2005). The Commission then issued its final determination based on a three-to-three split vote. *See Certain Tissue Paper Products from China*, 70 Fed. Reg. 15,350 (Mar. 25, 2005), P.D. 307. The views of the Commission are published in *Certain Tissue Paper Products from China*, Inv. No. 731–TA–1070B (Final), USITC Pub. 3758 (Mar. 2005) (hereinafter "Final Results"), P.D. 308. The period of investigation ("POI") was July 1, 2003, through December 31, 2003. *See Notice of Final Determination of Sales at LTFV: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. at 7476.

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[1] Citations to documents contained in the public administrative record are designated as "P.D.," followed by the document number assigned by the ITC. Citations to documents contained in the business proprietary, confidential administrative record are designated "C.D.," followed by the document number assigned by the Commission. Confidential versions of the ITC's tissue paper views appear at C.D. 518 (majority "Confidential Views") and 519 ("Dissenting Views").

Plaintiffs Cleo Inc ("Cleo"), its wholly owned subsidiary Crystal Creative Products, Inc. ("Crystal"), (collectively "Cleo/Crystal") – domestic producers of tissue paper – and Target Corporation ("Target"), a domestic purchaser of tissue paper, challenge the ITC's tissue paper determination. They appeal the ITC's 1) finding that bulk and consumer tissue paper constitute a single domestic like product; 2) attribution of the increase in Target's imports of consumer tissue paper to dumping despite Target's special requirements for consumer tissue; 3) decision to attribute to dumping the increase in Cleo/Crystal's consumer tissue imports; and 4) analysis of the data on injury and impact.

STANDARD OF REVIEW

The Court will uphold a determination by the Commission unless it is not supported by substantial evidence in the administrative record or is otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). The ITC's determination is "presumed to be correct," and the burden of proving otherwise rests upon the parties challenging the determination. 28 U.S.C. § 2639(a)(1).

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into account the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quotations and citations omitted). " '[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' " *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n.*, 383 U.S. 607, 619–20 (1966)); *see Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001). That Plaintiffs seeking a review

> can point to evidence of record which detracts from the evidence which supports the Commission's decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. It is not the function of a court to decide that, were it the Commission, it would have made the same decision on the basis of the evidence.

Matsushita, 750 F.2d at 936. Thus, under the substantial evidence standard, the Court may not, "even as to matters not requiring expertise . . . displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp.*, 340 U.S. at 488; *see also Grupo Industrial Camesa v. United States*, 85 F.3d 1577, 1582 (Fed. Cir. 1996). In sum, the Court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT ___, ___, 342 F. Supp. 2d 1267, 1272 (2004).

DISCUSSION

Commerce and the ITC have distinct functions in antidumping proceedings. Upon receipt of a petition, Commerce determines the scope of investigation by "determin[ing] that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value." 19 U.S.C. § 1673(i); *see* §§ 1673a, 1673d. If Commerce finds that subject merchandise is being sold at LTFV, the ITC then must determine whether a U.S. industry is being injured, threatened with injury, or materially retarded by reason of imports of that merchandise. §§ 1673, 1673a, 1673b. First, the ITC determines the scope of the "domestic industry" by defining the "domestic like product" under investigation. *See* 19 U.S.C. § 1677(4)(A). The Commission then makes either negative or affirmative injury determination. *See* 1673d(b). "[O]nly where [Commerce's] and the ITC's determinations are both affirmative," can Commerce issue an antidumping order.[2] *Badger-Powhatan v. United States*, 9 CIT 213, 216, 608 F. Supp. 653, 656 (1985).

A. The ITC's Finding of a Single Like Product

To determine whether an industry in the United States is materially injured or threatened with material injury by reason of imports of the subject merchandise, the Commission first defines the "industry"[3] and the "domestic like product."[4] *See* 19 U.S.C. § 1673(1)–(2). "The Commission's decision regarding the appropriate domestic like product is a factual determination, where the Commission applies the statutory standard of 'like' or 'most similar in characteristics and uses' on a case-by-case basis." *NEC Corp. v. Dep't of Commerce*, 22 CIT 1108, 1110, 36 F. Supp. 2d 380, 383 (1998) (citing *Torrington Co. v. United States*, 14 CIT 648, 652 n.3, 747 F. Supp. 744, 749 n.3 (1990), *aff'd*, 938 F.2d 1278 (Fed. Cir. 1991); *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 CIT 634, 638 n.5, 693 F. Supp. 1165, 1169 n.5 (1988)). "Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified." *Id.* (citing *Makita Corp. v. United States*, 21 CIT 734, 748, 974 F. Supp. 770, 783 (1997)). Consequently, "Commerce's desig-

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[2] For the purposes of § 1673, subject merchandise refers to "that merchandise upon which both affirmative LTFV sales and material injury determinations have been made." *Badger-Powhatan*, 608 F. Supp. at 656.

[3] "The term 'industry' means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A).

[4] " '[D]omestic like product' means a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle." 19 U.S.C. § 1677(10).

nation of the class or kind of merchandise sold at LTFV does not control the Commission's definition of the industry injured in its sales of like products." *Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85 F.3d 1561, 1568 (Fed. Cir. 1996).

In identifying a single like product, the ITC "disregards minor differences, and looks for clear dividing lines between like products." *Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995) (not reported in F. Supp.). The ITC has employed the following factors in its "like product" analysis: (1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer perceptions, (5) common manufacturing facilities and production employees, and where appropriate, (6) price. *See NEC Corp.*, 22 CIT at 1110. These factors are by no means exhaustive.[5]

Target claims that the Commission's analysis in this case rested on the notion that there is a legal presumption that the domestic like product is coextensive with the scope of the imports under investigation and was therefore legally flawed. Target S.J. Mem. 10–11. Cleo/Crystal, on the other hand, argues that the Commission imposed a stringent overlap requirement – "one that tolerates far less 'overlap' in the factors when looking for clear dividing lines between the two like products." Cleo Reply 3. Plaintiffs have not demonstrated how the ITC's analysis is distorted by these supposed presumptions. The ITC expressly refuted that it employed the presumption that the like product definition must be coextensive with the scope of Commerce's LTFV investigation. Def's S.J. Mem. 18–19; *see Acciai Speciali Terni S.p.A. v. United Staes*, 24 CIT 1064, 1065 n.3, 118 F. Supp. 2d 1298, 1300 n.3 (2000) (stating that it is ITC's task to determine "what domestic product or products is like the imported articles Commerce identified.") Plaintiffs also claim that the ITC's finding was not supported by substantial evidence and was not in accordance with law with respect to the six factors that the ITC employed to determine that bulk tissue paper and consumer tissue paper constitute a single like product.[6] As discussed below, the court's review of the adminis-

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[5] Legislative history demonstrates that when Congress tasked the ITC with making injury determinations in antidumping cases, it gave the ITC significant leeway in deciding what constitutes "like products:"

> The ITC will examine an industry producing the product like the imported article being investigated. . . . The requirement that a product be 'like' the imported article should not be interpreted in such a narrow fashion as to permit *minor differences in physical characteristics or uses* to lead to the conclusion that the product and article are not 'like' each other, nor should the definition of 'like product' be interpreted in such a fashion as to prevent consideration of an industry adversely affected by the imports under investigation.

S. Rep. No. 96–249 at 90–91 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 476–77 (emphasis added).

[6] Plaintiffs argue that the split among the Commissioners supports their position. This Court has held that "[s]uch a split in the evidence, however, is not fatal to the ITC's determination. It is well-established that there may be substantial evidence on an administra-

trative record leads it to conclude that the ITC's finding of a single like product was supported by substantial evidence and in accordance with law.

1. Physical Appearance

According to the ITC, the

> [s]ubject tissue paper products are produced from rolls of flat tissue paper (*i.e.*, jumbo rolls) and are cut to length sheets that are either white, colored, decorated, or customized in a variety of ways. They are sold either flat or folded and are typically used by businesses as a wrap to protect customer purchases or by consumers to wrap objects, often in conjunction with gift bags. Key performance characteristics include appearance, strength, and durability.

Final Results at 3. The ITC established that "bulk tissue" is "sold in bulk to independent retailers, department stores, specialty stores, catalog stores, cosmetic companies and manufacturers, which typically use the tissue paper in their own businesses, often to wrap customer purchases." Final Results at 6. " 'Consumer tissue' is sold packaged to various retailers (*e.g.*, mass merchants, warehouse discount clubs, specialty stores, party supply stores, drug stores, and grocery stores) for retail sale." Final Results at 6.

The Commission found that bulk and consumer tissue paper share the same general physical characteristics and uses. This position is solidly supported by the following evidence in the record: 1) Both forms of tissue paper are made from flat tissue and consist of lightweight paper with a gauze-like, fairly transparent character, Final Results at 6; Confidential Staff Report at I–5; 2) Consumer and bulk tissue paper come in a variety of grades, colors, designs, dimensions, quantities, and packaging, and both are sold primarily as white or solid color sheets, Confidential Staff Report at I–6–I–9; 3) Consumer and bulk tissue paper may be sold in printed form or undergo specialty treatment in small amounts, Final Results at 6–7; Confidential Staff Report at I–11–I–12, I–22 & Tables I–1–I–2; and 4) Consumer and bulk tissue paper are used for wrapping an item within a box, or bag or as lightweight gift wrap, Final Results at 7; Confidential Staff Report at I–6–I–7.

2. Manufacturing Processes

The Commission found a reasonable similarity with respect to the production processes for bulk and consumer tissue paper.[7] *See* Confidential Views at 9; Confidential Staff Report at I–12–I–17, I–23–

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tive record to support two inconsistent determinations." *Siderca, S.A.I.C. v. United States*, 29 CIT ____, ____, 374 F. Supp. 2d 1285, 1298 (2005) (citing *Consolo*, 383 U.S. at 620).

[7] But see the views of the dissenting Commissioners:

I–24 & App. D. Bulk and consumer tissue paper are both made from jumbo rolls of flat paper. Final Results at 6; *see* Tr., *In the Matter of Certain Tissue Paper Products and Crepe Paper Products from China*, Inv. No. 731 – TA – 1070 (Final) (Dec. 2004) at 17, P.D. 239 (hereinafter "Revised Tr.") (testimony of George D. Jones, III, President, Seaman). Producers making both forms of tissue paper reported that production takes place in the same facilities, using overlapping equipment and employees. For example, one producer reported [[ ]], and another reported [[ ]]. Confidential Staff Report at D–4. Bulk and consumer tissue paper are printed on the same presses. Confidential Staff Report at I–15–I–16, I–24 & App. D; Revised Tr. at 18–19, (Mr. Jones), 38–40 (Peter Garlock, President, Garlock Printing).

With respect to manufacturing facilities and processes, Plaintiffs claim that there is a dividing line between the two products, pointing out that nine of twelve of the U.S. producers make only one product. In addition, the two companies that produce both products demonstrate a [[ ]]. Target's S.J. Mem. 20. Notably, Plaintiffs point out that a small number of producers that manufacture both types of tissue paper often produce them on different production lines or with different equipment. Target's S.J. Mem. 20 (Final Results, App. 1, Tab. 1). Finally, Plaintiffs ask the court to consider the fact that Seaman [[ ]] Target's S.J. Mem. 21. Plaintiffs maintain that this agreement "belies" the government and Seaman's position that there is only one like product. Target's S.J. Mem. 21. Nonetheless, as the Commission ultimately found, these factors do not outweigh evidence in the record showing that most producers and importers considered bulk and consumer tissue to be the same or similar products. Confidential Staff Report at I–23–I–24 & App. D.

3. *Customer Perceptions and Interchangeability*

The government admits that the record was mixed regarding consumer perceptions and interchangeability. Indeed, the data is mixed. Seven U.S. producers generally found that bulk and consumer tissue paper were interchangeable, while five found them non-interchangeable. Confidential Staff Report at I–24–I–25 & D–3–D4. [[ ]] indicated that the only similarity between consumer and bulk tissue is the base tissue stock. That company pointed to differences

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Of twelve producers, only four manufacture both bulk and consumer tissue, and only one of these manufactures significant quantities of both. The evidence indicates that for the minority of firms that manufacture both bulk and consumer tissue paper, both products are produced in the same facilities with common employees and similar processes. Nevertheless, consumer tissue paper requires either different production lines and/or specialized equipment for the distinct packaging. Moreover, at least one large purchaser requires a lengthy design phase for the production of consumer tissue paper.

Dissenting Views at 7; C.D. 519, App. 4.

between consumer and bulk tissue paper based on the packaging, labeling, artwork, and folding of paper within packages. Confidential Staff Report at I–24–I–25 & D–3–D4. Eight importers affirmatively denied that there is interchangeability and five stated or suggested that they consider bulk and tissue paper interchangeable. *See* Confidential Staff Report at D–10–D–11.

Further, the Purchaser questionnaire revealed a limited consumer overlap between bulk and consumer tissue paper. Confidential Staff Report D–6–D–7. Out of five purchasers of bulk and consumer tissue paper, two perceived the products purchased as interchangeable, and one distinguished the two merely by size. Confidential Staff Report at D–6–D–7. [[ ]] denied any comparability between the tissue types. Confidential Staff Report at D–7. There is also evidence that many purchasers bought only one form of tissue paper. *See* Confidential Staff Report at D–6–D–7. The data does not reveal a discernible pattern. Because it is not the court's task to make its own evaluation based on the evidence before it, but to find whether the agency's finding has reasonable support in the record, the court will not upset the Commission's finding where sufficient evidence buttresses the agency's conclusion. *See, e.g., NEC Corp.*, 22 CIT at 1111.

4. *Channels of Distribution and Price*

In terms of distribution channels and price, the government concedes that there was only a limited level of overlap between the two types of tissue paper. Confidential Views at 8–9. In fact, consumer tissue paper was sold primarily to retailers in 2003 ([[ ]] percent of such shipments), while most domestic bulk tissue paper sales in 2003 were made to distributors ([[ ]] percent of such shipments). Confidential Staff Report at II–1 & Tables II–1–II–2. Plaintiffs claim that the Commission erred in finding that there was even a limited overlap between bulk and consumer tissue paper in terms of these distribution channels and price. *See* Cleo/Crystal S.J. Mem. 20; Target S.J. Mem. 27–28. However, the record demonstrates some overlap in the channels of distribution: [[ ]] percent of bulk tissue paper sales were made to retailers, the channel in which most consumer tissue paper was sold, while [[ ]] percent of consumer tissue paper sales were made to distributors, the channel in which most bulk tissue paper was sold. Confidential Views at 8–9; Confidential Staff Report at Table II–2.

Plaintiff Cleo effectively argues that this weak overlap reveals flaws in the ITC's prior position in *Folding Gift Boxes from China*, Inv. No. 731–TA–921 (Final), USITC Pub. 3480 (Dec. 2001): that an "overlap in terms of packaging quantities between [certain] . . . two [products is] a significant factor contributing to the blurring of any distinction between bulk and consumer tissue paper." Cleo S.J. Mem. 21 (citing Confidential Views at 10 n.49). Cleo argues that examining the sheet-count overlap "*in the context with the products being*

packaged and the channel of distribution to which they are marked discloses the overlap to be illusory." Cleo/Crystal S.J. Mem. 21. Specifically, Cleo explains that if bulk tissue paper is "overwhelmingly sold" by the ream (480 sheets) packaged in poly bags either as flat sheets or quire-folded sheets, and consumer tissue is usually packaged for sale as a retail item in smaller quantities of sheets (5 to 40 sheets), the overlap is minimal. However, as the ITC established, to the extent that there is an overlap,[8] the blurring in terms of packaging is not illusory, even in the context of different channels of distribution.

The ITC also found that the price of consumer tissue paper was generally higher than that of bulk tissue paper. Confidential Views at 9; Confidential Staff Report at I–19, I–26–I–27. On the other hand, as the Commission noted, the consumer tissue paper prices were more comparable to bulk with respect to larger packaging sizes, suggesting that sheet quantities per package played an important role in explaining price differences. Confidential Views at 9 & n.48; Confidential Staff Report at Table V–5; C.D. 440 at Ex. 4. Finding this overlap significant is a reasonable interpretation of the evidence. *See NEC Corp.*, 22 CIT at 1111.

Plaintiffs argue that the agency deviated from its prior practices, citing to several decisions that involved analogous factual scenarios. For instance, Plaintiffs refer to *Folding Gift Boxes from China*, where the ITC found that certain gift boxes sold to stores to give away to their customers and gift boxes sold to merchants for resale were separate like products. Inv. No. 731–TA–921 (Final), USITC Pub. 3480 (Dec. 2001). *See also Automotive Replacement Glass Windshields from China*, Inv. No. 731–TA–922 (Final), USITC Pub. 3494 (Mar. 2002); *Melamine Institutional Dinnerware from China, Indonesia, and Taiwan*, Inv. Nos. 731–TA–741–743 (Final), USITC Pub. 3016 (Feb. 1997). Plaintiffs argue that in each case, the Commission correctly found a clear division between the markets for consumer or retail goods and similar industrial or non-consumer goods. Drawing parallels between the present case and these prior decisions, Plaintiff asks the court to find the ITC's decision contrary to law because of its failure to adjudicate the case based on "the clear dividing line

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[8] The record shows that there are retail ready packages of seasonal consumer tissue folds with sheet counts between 90–120 sheets and "club packs" containing up to 400 sheets. Thus, while consumer tissue is often sold packaged in smaller quantities than bulk – in quantities ranging from 5 to 40 sheets – it is also often sold in seasonal packages and club packs containing from 90 to 400 (and even more) sheets, which are comparable in size to the packaging in which some bulk tissue paper is sold. Confidential Views at 7; Confidential Staff Report at I–9, I–22 & App. D; Amendment to Staff Report, C.D. 504 at I–10. Furthermore, although bulk tissue paper is usually sold in flat sheets, and consumer tissue paper in folded sheets, bulk tissue paper is also often sold in quire-folded sheets, while consumer tissue paper can be sold in unfolded flat sheet form. Confidential Views at 7; Confidential Staff Report at I–8–I–10.

between the consumer and non-consumer products." *See* Target's S. J. Mem. at 12.

While this argument is appealing at first, there are critical distinctions between the present case and these cases.[9] In addition, when an agency departs from its prior decisions, it must " 'explain the reasons for its departure,' " *Hussey Cooper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) (quoting *Citrosuco Paulista*, 12 CIT at 1209), and here the ITC did so by explaining why it did not divide the markets for consumer or retail goods and similar industrial or non-consumer goods. *See* Final Results at 9 n.49; *see also Citrosuco Paulista*, 12 CIT at 1209 ("[T]he Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under investigation.").

"In reviewing the Commission's like product findings under the substantial evidence test, it is not the province of the courts to change the priority of the relevant like product factors or to reweigh or judge the credibility of conflicting evidence." *NEC Corp.*, 22 CIT at 1111; *see Nippon Steel Corp. v. United States*, No. 05–1404, 05 –1417, 2006 WL 2290991, at *3 (Fed. Cir. Aug. 10, 2006) (quoting *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996)) (Commissioners "presumably are selected to be Commissioners based on their expertise in, *inter alia*, foreign relations, trade negotiations, and economics. Because of this expertise, Commissioners are the fact finders in the material injury determination: 'It is the Commission's task to evaluate the evidence it collects during its investigation. Certain decisions, such as the weight to be assigned a particular piece of

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[9] The Commission explicitly explains how it distinguished *Folding Gift Boxes from China* from this case:

> [T]he significant overlap in physical characteristics and uses, and in manufacturing facilities, processes, and employees evident on this record was lacking in *Folding Gift Boxes*. Entire phases of production (*e.g.*, design and collating), involving different processes, facilities, and equipment, were unique to retail boxes as compared to give-away boxes. . . .
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> Final Results at 9 n.49. Similarly, in *Melamine Institutional Dinnerware*, the Commission found that melamine institutional dinnerware and melamine retail ware were different like products based on the fact that 1) there were clear physical appearance and distribution differences between the two products, 2) producers and purchasers uniformly considered them different products, and 3) the parties agreed that they were different like products. USITC Pub. 3016 at 10–13.

In rebutting Plaintiff's position, the government argues that the Commission's like product finding in this case resembles its findings in a number of previous determinations. *See, e.g., Certain Pasta from Italy and Turkey*, Inv. Nos. 701–TA–365–366 and 731–TA–734–735, USITC Pub. 2977 (July 1996) at 8–9 (rejecting argument that dry pasta packaged for sale to "the retail market" and dry pasta packaged in bulk for sale to industrial users were different like products, and noting that similarities in products' basic physical characteristics, end uses, and production processes outweighed differences between products with respect to their packaging, channels of distribution, price, and fact products had only limited degree of interchangeability).

evidence, lie at the core of that evaluative process.' "). Thus, the court must afford deference to the Commission's decision to give a greater weight to the physical characteristics, end use, and production similarities between bulk and consumer tissue paper as opposed to the differences in their distribution channels, pricing and interchangeability, and to uphold the ITC's conclusion that bulk tissue paper and consumer tissue paper constitute a single like product.

B. The Commission's Finding of Material Injury by Reason of Imports

"An affirmative injury determination requires both (1) present material injury and (2) a finding that the material injury is 'by reason of' the subject imports." *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 719 (Fed. Cir. 1997) (citations omitted). The relevant statute provides:

> The Commission shall make a final determination of whether –
> (A) an industry in the United States –
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
> *by reason of imports*, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section. If the Commission determines that imports of the subject merchandise are negligible, the investigation shall be terminated.

19 U.S.C. § 1673d(b)(1) (emphasis added). "In general [t]he term 'material injury' means harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A). When determining the causal connection between imports and material injury, the "ITC is required to consider three factors . . . : 1) the volume of imports, 2) the effect of imports on prices of like domestic products, and 3) the impact of imports on domestic producers of like products." *USX Corp. V. United States*, 11 CIT. 82, 84, 655 F. Supp. 487, 490 (citing 19 U.S.C. § 1677(7)(B) (1982)). In addition, the ITC "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii).

1. Import Volume Finding

"In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or rela-

tive to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). The ITC found that the volume of subject imports had been significant during the period examined in absolute and relative terms. It observed a sharp increase throughout the POI, rising from [[ ]] million square meters in 2001 to [[ ]] million square meters in 2002 and [[ ]] million square meters in 2003. Thus, the absolute volume of subject imports increased approximately [[ ]] percent between 2001 and 2003, with the subject imports gaining [[ ]] percentage points of market share during this period. Confidential Views at 23–24. The ITC concluded that the "domestic market share [of the subject merchandise] declined by approximately the amount that subject import market share grew, from 91.0 percent in 2001 to 87.2 percent in 2002 and to 70.9 percent in 2003." Final Results at 17 & Table IV–2. Moreover, "[s]ubject import volume relative to production in the United States increased throughout the POI, rising from [[ ]] percent in 2001 to [[ ]] percent in 2002 and to [[ ]] percent in 2003." Confidential Views at 24.

In its analysis, the Commission considered volume trends for bulk and consumer tissue paper. As the Commission found, the subject imports of bulk tissue paper increased from [[ ]] square meters to [[ ]] square meters between 2001 and 2003. Confidential Views at 24–25. The subject imports of consumer tissue paper increased from [[ ]] square meters to [[ ]] square meters between 2001 and 2003. Confidential Views at 25. Further, between 2001 and 2003, Target's imports of consumer tissue paper increased by [[ ]] square meters, and Cleo/Crystal's imports of consumer tissue paper [[ ]] square meters. Thus, Target and Cleo/Crystal accounted for [[ ]] percent of the total increase in subject import volume during the POI. C.D. 498 (Importer Comparison Data Run Sheet); *see* Confidential Staff Report at IV–4 ("[[ ]] accounted for [[ ]] of subject tissue paper imports from China in 2003."). Importantly, the Importer Comparison Data Run Sheet indicates that Target's share of growth of the consumer tissue paper imports between 2002 and 2003 was approximately [[ ]] percent, and Cleo/Crystal's share about [[ ]] percent. C.D. 498; *see also* Hr'g Tr. 21.

Plaintiffs urge the court to focus on the underlying reasons for increased imports rather than the mere volume of imports. *See* Target S.J. Mem. 31; Cleo/Crystal S.J. Mem. 30–31. They claim that they accounted for the vast majority of the consumer tissue paper imports in 2003 and that their imports were non-injurious because they were not by reason of dumped merchandise. *See* Target S.J. Mem. 31; Cleo/Crystal S.J. Mem. 29–32. Thus, they maintain that the Commission failed to establish the requisite causal nexus between subject imports and the injury to domestic industry required under 19 U.S.C. § 1673d(b).

a. Target's Imports

Target claims that its imports of consumer tissue paper were non-injurious because they "did not displace domestic production." Target S.J. Mem. 31. Citing to several prior cases where the Commission found that imports serving new or expanding markets without displacing domestic production did not have a significant adverse effect, Target claims that it opened and expanded a new market for specialty consumer tissue paper. Target S.J. Mem. 31 (citing, *e.g.*, *Fresh Cut Roses from Colombia and Ecuador*, Invs. Nos. 731–TA–684–685 (Final), USITC Pub. 2862 at 42 (Mar. 1995) (finding that "imports were sold into important new markets and did not significantly displace domestic fresh cut roses in their existing markets")). Since 2001, Target has seen significant growth in a new market for consumer tissue paper "driven by consumers' growing preference for gift bags, [sic] and Target's innovative concept that introduced fully coordinated, mix-and-match color programs." Target S.J. Mem. 32–33 (citing Admin. Tr. at 202–11, P.R. 239). Target explains that consumer tissue paper became part of a coordinated line of gift-wrapping products unique to the company. Target S.J. Mem. 32–33.

Target contends that domestic companies did not have the capacity for the kind of design, color, and quality that Target required. Target S.J. Mem. 34. It explained that domestic producers could not provide it with the specialized collated presentations and packaging that it needs. *See* Revised Tr. at 211–12. Finally, Target maintains that prior to 2004, no domestic industry actually attempted to meet its needs. In 2004, [[ ]] offered to supply Target with consumer tissue paper; however, Target found that [[ ]] did not maintain a design team, which itself would disqualify the company from two of Target's programs. Decl. Deborah Kelley, ¶ ¶ 7–8, Target's Post-Hr'g Br., Att. A (Jan. 12, 2005), C.D. 441 ("For [one of Target's programs], [[ ]] would have to develop design capabilities."). Target claims that the Commission unfairly focused on one transaction between [[ ]] and Target to conclude that Target was purchasing domestic consumer tissue. *See* Final Results at 23. Target's Senior Buyer also affirmed that to her knowledge, "none of the petitioners in this investigation have qualified as vendors to Target for" two of its product programs. Decl. Deborah Kelley, ¶ 2, Target's Post-Hr'g Br., Att. A, C.D. 441. Finally, Target maintains that the Commission also incorrectly considered Target's purchases of *bulk* tissue from certain domestic sources, which it considers "entirely irrelevant to the issue of whether the U.S. industry can meet Target's special requirement for *consumer* tissue." Target S.J. Mem. 35 & n.92 (citing Confidential Views at 34).

The Commission considered Target's claim that it only purchased growing amounts of subject consumer tissue paper imports because the domestic industry was unwilling or unable to meets its demands. It focused on bulk and consumer tissue paper and concluded that the

record demonstrated that Target's tissue paper needs could be met by domestic suppliers. Thus, one domestic producer was [[ ]]. Seaman's Post-Hr'g Br., Ex. 1, Answers to Commission's Questions at 27, C.D. 441; *see also* Confidential Views 33–34. In addition, one domestic supplier reported that [[ ]]. *See* Confidential Staff Report at V–19. Furthermore, although Target claims that it could not source certain specialty paper from the domestic industry, the ITC concluded that "[s]ales of specialty tissue in relation to the overall U.S. market for tissue paper appear small, and the record shows that the domestic industry competes for such sales." Confidential Views at 23; Confidential Staff Report at I–11 & Table I–2. Specifically, in 2003, specialty tissue constituted [[ ]] percent of the domestic industry's U.S. shipments of consumer tissue paper, and [[ ]] percent of importers' U.S. shipments of consumer tissue paper. Confidential Staff Report at I–11. Overall, therefore, the Commission reasonably concluded that Target could not argue that the domestic companies were unwilling to supply Target with tissue paper.[10]

The court " 'must affirm a Commission determination if it is *reasonable* and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion.' In short, we do not make the determination; we merely vet the determination." *Nippon Steel Corp.*, 2006 WL 2290991 at *5 (emphasis added) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004)). Although Target's share in the growth of the *consumer* tissue paper imports between 2002 and 2003 was significant (approximately [[ ]] percent), and Target's "new market" theory is appealing, there is also reasonable support in the record that domestic producers could and were willing to meet its needs during the period examined as the ITC found. *See* Confidential Views at 34.

b. Cleo/Crystal's Imports

Cleo/Crystal argues that the majority of Commissioners "did not properly take into account the effect of Cleo/Crystal's supply interruption and subsequent plant closure in 2003, which were in no way due to subject imports, and of Cleo/Crystal's increased, non-injurious imports in 2003, which had become necessary, given the cessation of its domestic production." Cleo/Crystal S.J. Mem. 30. In October 2002, Cleo purchased Crystal, a tissue converter, and simultaneously entered into a renewable supply contract with [[ ]], Crystal's related paper-making company, for tissue stock (or jumbo rolls) to be delivered to Crystal's converting operation before the end of

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[10] Further supporting its position, the Commission explains that "there is no consensus within the industry as to what constitutes 'specialty' tissue paper." Confidential Staff Report at I–11. The Commission cites to several sources buttressing this observation. Confidential Staff Report at I–11–I–12 & nn.56–58.

2003.[11] *See* Cleo/Crystal's Post-Hr'g Br. (Jan. 12, 2005), App. at A–1 & Ex. 1 at 7–8, C.D. 440. However, in 2003, Cleo decided to terminate its production of consumer tissue following "the sudden and unexpected decision" by its supplier not to honor the supply contract and the loss of its supplier of rotogravure printing services. Cleo/Crystal S.J. Mem. 6. As a result, Cleo/Crystal claims that it could neither find an adequate source of roll stock, nor a new rotogravure printing company because only flexographic printing (inherently inferior in quality) was available in the United States. *See* Cleo/Crystal S.J. Mem. 24–25; Confidential Views 20–21. Consequently, Cleo/Crystal decided that its only viable option was to cease domestic production of consumer tissue and to increase imports.[12] *See* Cleo/Crystal's Post-Hr'g Br., App. at A–2, A–4–A–7; Cleo/Crystal S.J. Mem. 8.

Cleo/Crystal argues that instead of addressing this evidence, the majority of Commissioners improperly focused on what they believed Cleo/Crystal should have concluded regarding alternative domestic suppliers. Specifically, the Commission considered [[ ]] a viable supplier of roll stock and decided that Cleo/Crystal's printing needs could have been filled by domestically available flexographic printing. *See* Confidential Views at 20–21.

The parties do not dispute that as a result of its supplier's shutdown in 2003, Cleo/Crystal found itself in need of another supplier, but they disagree on whether Cleo/Crystal's decision to import resulted from the domestic industry's inability to meet its production needs. In parallel, Cleo/Crystal maintains that the cessation of its domestic production necessitated increased imports; thus, the requisite causal link between imports and injury under 19 U.S.C. § 1673d(b) cannot be met. *See* 19 U.S.C. § 1673d(b).

Indeed, in determining whether subject imports were significant under 19 U.S.C. § 1677(7)(C)(i), it is proper to consider the overarching requirement that there be a causal link between imports and injury required by 19 U.S.C. § 1673d(b). The ITC reasonably rejected Cleo/Crystal's claim that it imported significant amounts of subject consumer tissue paper in 2003 *only because* it experienced a raw material supply shortage in that year and the domestic industry could not meet its needs. Confidential Views at 19–21. First, the ITC found that even prior to Cleo's acquisition of Crystal, Cleo was already importing subject tissue paper [[ ]]. Final Results at 14. Cleo imported [[ ]] square meters of subject tissue paper from China in

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[11] As the record showed, Crystal was the largest domestic supplier of tissue paper in the U.S. market through [[ ]], when [[ ]]. Confidential Views at 13. Crystal had acquired its tissue rolls from [[ ]]. Cleo/Crystal S.J. Mem. 6.

[12] In July 2003, [[ ]] purchased Crystal's bulk tissue business, but not its consumer tissue business. That is, [[ ]] purchased Crystal's [[ ]]. *See* Cleo/Crystal's Pre-Hr'g Br. (Dec. 2, 2004) at 14–15 & Ex. 3; C.D. 378, App. 9.

2001 and then [[ ]] square meters in 2002. Final Results at 14; Amendment to Confidential Staff Report at Table III–1 n.3, C.D. 495. The ITC determined that this volume of imports constituted [[ ]] percent of its domestic production in that year. Final Results at 14; Amendment to Confidential Staff Report at Table III–1 n.3, C.D. 495. Thus, the Commission concluded that "Cleo was shifting substantial volumes of its sales to subject imports in 2001 and 2002, well before it experienced any raw materials shortage in 2003." Cleo/Crystal S.J. Mem. 30–31.

The Commission also found some evidence that, prior to the acquisition of its tissue paper operations by Cleo, Crystal believed that the subject imports were harming its tissue paper operations. Confidential Views at 19; *see, e.g.*, Revised Hr'g Tr. at 26–27 (Ted Tepe, Vice President, Seaman). In 2001, Crystal even sought legal advice concerning the possibility of filing an antidumping petition against the subject imports. Confidential Views at 19. In addition, at that time, Crystal's investment bankers also reported that [[ ]] Cleo Pre-Hr'g Br. Ex. 2 Tab. 5 at 41, C.D. 378 (excerpt from [[ ]] report). These pieces of evidence reasonably support the ITC's conclusion that Cleo/Crystal contemplated shifting its paper tissue supply from the United States to China because it "viewed low-priced imports as a significant source of competition." Confidential Views at 19.

The Commission's finding that there was a viable domestic source of tissue paper also is supported by the record. The ITC considered [[ ]] because [[ ]]. Amendment to Confidential Staff Report at IV–8 n.24, C.D. 495. This evidence led the Commission to conclude that "Cleo was more interested in continuing to shift its tissue paper supply overseas than it was in seeking domestic sources of raw materials." Cleo/Crystal S.J. Mem. 31.

Similarly, the Commission's rejection of Cleo's claim that it began purchasing subject imports because it lost its rotogravure printing company has support in the record. First, the Commission found that "state-of-the-art flexographic printing, for which there is ample domestic capacity, meets quality requirements of the tissue paper industry." Confidential Views at 20–21 (citing [[ ]], USCIT Tel. Int. (Jan. 31, 2005), C.D. 481; Revised Hr'g Tr. at 40–41); *see* Revised Hr'g Tr. 84 (testimony of Mr. Garlock, President, Garlock Printing & Converting, Inc.) ("[W]e actually looked at Target's current tissue line and found that we could print just about any one of those designs flexographically."). The Commission also established that rotogravure printing, albeit of a slightly inferior quality than one available in China, was available in the United States. Confidential Views at 21 (citing Confidential Staff Report at IV–8); *see* [[ ]], USCIT Tel. Int. (Jan. 31, 2005).

In this case, the Commission gave more weight to the testimony and assertions proffered on behalf of certain domestic companies, such as [[ ]] and [[ ]], than those of Cleo/Crystal and Target. How-

ever, the court cannot re-evaluate evidence in this case. *See U.S. Steel Group*, 96 F.3d at 1357 ("It is the Commission's task to evaluate the evidence it collects during its investigation. Certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of that evaluative process."). In particular, this Court cannot second-guess the ITC's credibility determinations unless there is evidence undermining those determinations. *See Nippon Steel Corp.*, 2006 WL 2290991, at *9 ("The assessment of the proper weight to accord to testimony is within the role of the Commission, not this court and not the Court of International Trade.").[13]

Both Cleo/Crystal and Target advanced rigorous arguments concerning the significance of their imports and their impact on the domestic industry. The Importer Comparison Data Run Sheet to a large extent supported their respective positions because Target's share of the growth of consumer tissue paper imports between 2002 and 2003 was approximately [[ ]] percent, and Cleo/Crystal's share about [[ ]] percent. *See* C.D. 498; *see also* Ct. Hr'g Tr. 21. The court acknowledges that business judgment played a significant role in the companies' decision to source their needs from China; however, the court is constrained by its standard of review to uphold the ITC's finding with respect to the significance of imports. *See Nippon Steel Corp.*, 2006 WL 2290991 at *5.

2. The Effect of Subject Imports on Domestic Prices

The statute further provides that in evaluating the price effects of subject imports, the Commission shall consider whether

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). The significance of underselling need not be based on a finding that underselling actually suppressed or de-

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[13] During oral argument, the government advanced certain interpretations that it did not argue in its brief. It argued that the Commission's rejection of Cleo/Crystal's argument that at the time Cleo/Crystal made a business decision to import roll stock paper the domestic industry could not supply its demands was based on a credibility determination, which this Court cannot second-guess. Ct. Hr'g Tr. 39. The government explained that the Commission looked at the evidence and found roll stock available from domestic producers, specifically [[ ]], and concluded that Cleo/Crystal was wrong. Ct. Hr'g 39:2–14. Likewise, the government maintains that Cleo/Crystal's claim that the rotogravure printing could not be adequately replaced with flexographic printing was undermined by the Commission's credibility determination that there was not such a significant difference in quality between the two printing processes. Ct. Hr'g Tr. 41.

pressed domestic prices. *See Altx, Inc. v. United States*, 25 CIT 1100, 1109, 167 F. Supp. 2d 1353, 1365–66 (2001).

The ITC considered pricing data for four tissue paper products. Product 1 was white tissue paper; product 2, solid color tissue paper (other than specialty tissue paper products); product 3, combination (four print and four solid color) tissue paper; and product 4, white bulk tissue. Confidential Views at 26; Confidential Staff Report at V–7, V–10 – V–12 Table V–2–V–5. The ITC found that subject imports undersold the domestic product by comparing data on domestic and importer prices for all four products. Confidential Views at 27. It found that the "[s]ubject imports undersold the domestic product in 33 quarters [out of 45] by a combined weighted average of [[ ]] percent." Confidential Views at 27 (citing C.D., P.D. at Table V–7 (as revised by Mem. INV–CC–019)). It found that "the pricing data show[ed] some evidence of price depression, but [did] not demonstrate significant price effects of imports on domestic prices." Confidential Views at 28. The Commission concluded that significant underselling by subject imports led to substantial declines in the domestic industry's market share.[14] Confidential Views at 28–30.

Plaintiffs argue that the ITC's finding of underselling is not supported by substantial record evidence. Cleo/Crystal maintains that the ITC improperly combined price comparison data for all four products. Cleo/Crystal S.J. Mem. 33; *see* Target S.J. Mem. 39. Specifically, Cleo/Crystal claims that considering the data for each product separately shows no underselling. With respect to product 1, Cleo/Crystal's argument is straightforward. The majority found underselling in six of 15 quarterly comparisons, with margins ranging from [[ ]] percent to [[ ]] percent, Confidential Views at 27, indicating that underselling did not occur in nine of 15 comparisons. Regarding product 2, however, Cleo/Crystal's argument is tenuous. The Commission found that subject imports undersold the domestic product in 12 out of 13 comparisons, with quarterly average margins ranging from [[ ]] percent to [[ ]]. Confidential Views at 27. Cleo/Crystal claims that this finding is unsupported by substantial evidence because, as found by the dissenting Commissioners:

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[14] The large transfer of market share from domestic to Chinese producers is further borne out by the fact that eleven of twelve responding purchasers reported that since January 2001 they had shifted purchases from U.S. producers to Chinese importers. Three of nine stated that price was the reason for the shift, while one of seven stated that, since January 2001, U.S. producers reduced their prices in order to compete with prices of Chinese imports.

Confidential Views at 29. In further support of the ITC's position, [[ ]], reported that [[ ]]. Confidential Views at 29. Similarly, [[ ]]. Confidential Views at 29; Confidential Staff Report at Table V–9, V–19 – V–20, V–22.

> The [[ ]]. In contrast, [[ ]]. Therefore, the limited comparisons preclude a probative analysis of the price data for product 2.

Dissenting Views at 24. Explaining that the tissue paper industry offers discounts based on increased purchasing volume, Confidential Staff Report at V–3, Cleo/Crystal maintains that "[[ ]]" Cleo/Crystal S.J. Mem. 34. However, looking at the relevant comparison table, the numbers for U.S. sales to retailers are consistently higher than the numbers for the Chinese counterparts. *See* Confidential Staff Report at V–10 Table V–3. In addition, the quantity of U.S. sales to retailers declined, while the quantity of Chinese sales to retailers increased over the period examined. *See* Confidential Staff Report at V–10 Table V–3. Thus, while Plaintiff's argument is plausible, it fails to account for the entire data as it is subdivided with respect to retailers and distributors.

Regarding product 3, Plaintiff is correct that the U.S. sales data is available only for four quarters, making the comparison less meaningful. *See* Confidential Staff Report at V–11 Table V–4. As to product 4, Plaintiff concedes that the data supports the ITC's finding of underselling. Cleo/Crystal S.J. Mem. 35; *see* Confidential Staff Report V–12 Table V–5.

While viewing products 1 and 3 separately weakens the ITC's finding, the combined data supports its determination. As explained by the government, Plaintiffs appear to believe that the Commission's "aggregated" analysis involves making underselling comparisons between pricing products. The Commission, however, generally totals the number of underselling and overselling analyses for its pricing products in its analysis "in order to assess whether, as a whole, its price comparison data reflects consistent or prevalent price underselling throughout the market, as evidenced by the underselling data for its comparison products." Gov't Resp. 37; *see Altx, Inc.*, 167 F. Supp. 2d at 1365 ("The significance of underselling in an investigation will necessarily depend on the particulars of the product and industry at issue, not necessarily on the import of certain percentages understood in the abstract."); *see also Citrosuco*, 704 F. Supp. at 1087–88 (1988) ("[T]he Commission's determinations must be based upon an independent evaluation of the factors with respect to the unique economic situation of each product and industry under investigation.").

3. Impact on Affected Domestic Industry

In examining "the impact of imports of [subject] merchandise on domestic producers of domestic like products, but only in the context of production operations within the United States," 19 U.S.C. § 1677(7)(B)(i)(III),

> the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to –
>
> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices,
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
> (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

19 U.S.C. § 1677(7)(C)(iii).

The Commission concluded that subject imports of tissue paper had a significant impact on the domestic industry. In its analysis, the Commission examined the production, trade, and financial data of the domestic industry and concluded that the industry's condition declined considerably during the period examined. Between 2001 and 2003, domestic output fell [[ ]] percent, capacity utilization [[ ]] percent, domestic shipments [[ ]] percent, and net sales [[ ]] percent. Confidential Views at 30–32. The number of workers employed by the industry fell from [[ ]] to [[ ]] in the same period, and total wages declined as well. Confidential Views at 31. In addition, the industry's profitability levels simultaneously fell, with operating income falling from [[ ]] to [[ ]] and operating profit margins falling from [[ ]] percent to [[ ]] percent. Confidential Views at 32.

Cleo/Crystal claims that its decision to "shutdown [its plant] was not due to subject imports and, as a consequence, it would be a fatal analytical error to combine Cleo/Crystal's various declining business and financial indicators with the indicators of other domestic producers" in evaluating the impact of subject imports domestic industry. Cleo/Crystal Reply 12. Specifically, it argues that "[i]n the consumer segment, the [[ ]]." Cleo/Crystal S.J. Mem. 38 (citing Confidential Staff Report at C–8, Table C–3A, C–7, Confidential Staff Report). For the same reason, Plaintiff invites the court to ex-

clude Cleo/Crystal's imports data from the [SG&A[15] values for consumer and all tissue paper to show that SG&A values did not decline contrary to the ITC's findings]. Cleo/Crystal Reply 12. Furthermore, Cleo/Crystal suggests that the Commission disregarded that the "[[ ]] not imports." Cleo/Crystal Reply 12.

Plaintiff's argument for exclusion of its data from the Commission' calculations is faulty because it is based on a circular logic. Only if the court rejects the ITC's reasonable finding that Cleo/Crystal's imports were significant does that argument stand. As addressed earlier, the Commission reasonably found that record evidence did not support Cleo's claim that it was unable to replace its lost raw material supply or to obtain printing services domestically. Confidential Views at 33–34. This finding, in turn, legitimizes the ITC's decision to include *all* domestic producers and resellers in its calculations, including Cleo/Crystal. Further, the Commission found that the industry's increased costs during the POI did not account for the industry's declining sales and production volumes. *See* Gov't Resp. 39; Confidential Views at 34. Instead, sales declines exacerbated "the increased unit costs of the industry, which grew as production and sales volumes fell." Gov't Resp. 39 (citing Confidential Views at 34). Plaintiffs do not point to any evidence to contradict this conclusion.

Plaintiffs also argue that the ITC was incorrect in combining bulk tissue and consumer tissue data in analyzing the domestic industry trends. They insist that "even if, *arguendo*, there were only one like product, there are two distinct market segments in which consumer and bulk tissue paper are sold." Cleo/Crytal S.J. Mem. 37; *see* Cleo Reply 13 (arguing that "segment analysis" would be appropriate because Cleo/Crystal's operations were separated in terms of its bulk tissue and customer tissue production). The ITC considered separately the volume trends and pricing trends for bulk tissue paper and consumer tissue paper products in its analysis "when appropriate." Confidential Views at 17 n.84; *see e.g.*, Confidential Views at 17 (demand), 22–23 (substitutability). The ITC found that the two forms of tissue paper were not sufficiently differentiated to warrant treating them as constituting different market segments. Confidential Views at 17 n.84. The ITC's task is to assess whether the industry "as a whole" has been injured by the subject imports. *See Copperweld Corp. v. United States*, 12 CIT 148, 165–66, 682 F. Supp. 552, 569–70 (1988) (finding that language in 19 U.S.C. § 1673d(b)(1) and § 1677(4)(A) (1980 & Supp. 1986) "makes manifestly clear that Congress intended the ITC [sic] determine whether or not the domestic industry (as a whole) has experienced material injury due to the imports"); *Nippon Steel Corp.*, 19 CIT at 471 (holding that ITC is

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[15] Selling, General, and Administrative Expenses. Labor cost and SG&A are considered to be non-import causes of stress when evaluating industry conditions. *See* Cleo/Crystal S.J. Mem. 37.

not required to conduct specific segmented market analysis). Plaintiffs did not demonstrate how the ITC's decision not to segment the markets for material injury is unsupported by record evidence or contrary to law.

Finally, Plaintiffs challenge the ITC's use of one set of financial data over another for [[ ]] in evaluating the domestic industry's condition. [[ ]] first submitted its 2003 financial data for the fiscal year ending in June. *See* Confidential Staff Report at VI–1 n.1. That data did not capture [[ ]] purchase of [[ ]] bulk business in July 2003. *See* Target Resp. Letter 1; Confidential Staff Report App. C. Thus, while [[ ]] bulk sales volume disappeared from the data, [[ ]] corresponding increase in production of bulk tissue does not appear in this data submitted by [[ ]]. Target Resp. Letter 1; Confidential Staff Report App. C. The ITC requested that the [[ ]] submit data for fiscal year 2004. *See* Confidential Staff Report at VI–1 n.1. The ITC then prepared two sets of charts indicating trends in the domestic industry's financial data from 2001 to 2003 using two different sets of data. The first set of charts incorporates the three years of financial data for [[ ]] ending with fiscal year 2003 results. *See* Confidential Staff Report Tables VI–1–VI–3 & App. C; see Gov't Resp. Letter 3. The second set covers the three years of financial data for [[ ]] ending with its fiscal year 2004 results. *See* Confidential Staff Report App. E. Plaintiffs claim that the ITC should have used the 2004 fiscal year data in its evaluation of the industry's performance.

In its analysis, the ITC considered both sets of data. *See* Confidential Views at 32 n.165. Importantly, both sets show notable declines in the industry's conditions during the POI. For example, looking at the first set of data, the domestic industry's net sales decreased from [[ ]] square meters in 2001 to [[ ]] billion square meters in 2003, or [[ ]]. *See* Confidential Staff Report Table C–1. The second set of data indicates a decline from [[ ]] square meters in 2001 to [[ ]] square meters in 2003, or [[ ]] percent. *See* Confidential Staff Report Table E–1. Remand would be proper if the ITC relied on erroneous or incomplete data. *See, e.g., Int'l Imaging Materials, Inc. v. U.S. Int'l Trade Comm'n*, Slip Op. 06–11, at 34–35, 2006 WL 270156 at **11–12 (CIT Jan. 23, 2006). However, other comparisons, such as profits and operating income, indicate that Plaintiffs did not demonstrate that the use of the alternative data for [[ ]] would have changed the ITC's conclusion that there were declines in domestic industry performance. *Compare* Confidential Staff Report Table C–1, *with* Confidential Staff Report Table E–1. Plaintiffs sidestep the ITC's finding that bulk and consumer tissue paper were part of the same like product, and pinpoint significant differences in numbers confined to the industry's bulk tissue paper operations. Plaintiffs do not show how the use of 2004 fiscal year data for [[ ]] would have changed the observed downward trends in operating performance of

the domestic industry.[16] Even if significant bulk shipments were included in the financial data, the ITC's ultimate conclusion has sufficient support in that alternative data. *See* Confidential Staff Report Table E 1.

The use of the 2004 fiscal year data for [[ ]]. *See* Cleo/Crystal Resp. Letter 2; Confidential Staff Report at E–4 Table E–2. Capitalizing on this trend, Cleo/Crystal more specifically argued that this data, combined with consumer tissue data, covering all domestic producers except for Cleo/Crystal, would show positive trends. Cleo/Crystal Resp. Letter 3. The court rejects this argument because it is based on the premise that Cleo/Crystal should have been excluded from the investigation as a domestic producer and importer without sufficient evidence to support it.

The court finds that substantial evidence supports the Commission' finding that the domestic industry's performance declined over the period examined. The ITC determined that the domestic industry was materially injured based on declines in the industry's production, capacity utilization, shipments, sales, employment, and profitability levels – all indicating that the subject imports had a significant adverse impact on the domestic industry.

CONCLUSION

Having reviewed the underlying record, this court concludes that the Commission's determination that consumer and bulk tissue paper constitute a single like product and that the domestic industry was injured as a result of increased imports of the subject merchandise is supported by substantial evidence and otherwise in accordance with law.

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[16] The court rejects Defendant and Defendant-Intervenor's interpretation of USCIT Rules 81(i) and 56.2(c) that Plaintiffs raised this argument before the court in a belated fashion. *See* Gov't Resp. Letter 4; Seaman Resp. Letter 1. Initially, Cleo/Crystal brought the issue to the court's attention with respect to the dissenting Commissioners' findings, arguing that their analysis of the bulk tissue industry was erroneous due to its use of the 2003 fiscal year financial data for [[ ]]. Thus, if the court were to adopt Plaintiffs' position that consumer and bulk tissue paper be analyzed separately, the court would have to use the 2004 fiscal year data for [[ ]]. *See* Cleo/Crystal S.J. Mem. 39 n. 102. Plaintiffs further pursued this argument and its variations in Cleo/Crystal's Reply Brief and during oral argument.

The parties do not dispute that this issue was properly raised in the administrative proceedings. *See* Target Resp. Letter 1–2; Cleo/Crystal Resp. Letter 1–2; Seaman Resp. Letter 2. Cleo/Crystal first raised the financial data issue in their post-hearing brief. *See* C.D. 422, at 10–12. After [[ ]] submitted financial data for fiscal year 2004 and the ITC reviewed it deciding to use the 2003 fiscal year data, Cleo/Crystal again raised the issue in its Final Comments. *See* Cleo/Crystal's Final Comments at 10–12, C.D. 514.

Slip Op. 06–133

SKF USA INC, SKF FRANCE S.A., and SARMA, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Before: WALLACH, Judge
Court No.: 03–00490
PUBLIC VERSION

[United States Department of Commerce's Final Results of Redetermination is Affirmed in Part and Stricken in Part.]

Dated: September 1, 2006

Steptoe & Johnson, LLP, (*Herbert C. Shelley, Alice A. Kipel*, and *Susan R. Gihring*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *Stephen C. Tosini*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Rachael E. Wenthold*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

OPINION

Wallach, Judge:

I
Introduction

This matter comes before the court following the court's order of August 24, 2005, remanding this matter to the United States Department of Commerce ("the Department" or "Commerce") to recalculate its antidumping duty margin for SKF USA Inc., SKF France S.A., and Sarma (collectively "SKF") in its administrative determination in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan and Singapore: Final Results of Antidumping Duty Administrative Reviews, Recission of Administrative Review in Part, and Determination Not to Revoke Order in Part*, 68 Fed. Reg. 35,623 (June 16, 2003) ("*Final Results*"). With regard to its recalculation of SKF's margin, Commerce's Remand Redetermination is found to be supported by substantial evidence and in accordance with law because Commerce properly supported its finding after conducting a re-verification of SKF's facilities in France. As a result, the portion of Commerce's Remand Redetermination recalculating SKF's margin is affirmed. Because the remainder of the Remand Redetermination attempts to improperly reargue issues already decided by this court, misstates the court's prior opinion, misconstrues its holding, and mischaracterizes the evidence before the court, it is hereby stricken. This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2003).

II
Background

Plaintiffs are producers and exporters of ball bearings subject to the antidumping duty order on ball bearings and parts thereof from France published on May 15, 1989. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, Spherical Plain Bearings, and Parts Thereof from France*, 54 Fed. Reg. 20,902 (May 15, 1989). On February 7, 2003, Commerce published its preliminary results of administrative review for the May 1, 2001, to April 30, 2002, period of review ("POR"). *Ball Bearings and Parts Thereof from France, Germany, Italy, and Singapore: Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent to Revoke Order in Part*, 68 Fed. Reg. 6404 (February 7, 2003).

In the *Final Results*, Commerce held that because SKF and Sarma were unprepared at verification to segregate sales by market or by class or kind of subject merchandise Commerce was therefore unable to verify the accuracy of the reported information. Defendant's Opposition at 6. As a result, Commerce found that SKF did not act to the best of its ability and assigned a margin of 10.08 percent based on partial adverse facts available ("AFA") in the *Final Results*. Plaintiffs' Motion for Judgment Upon the Agency Record ("Plaintiffs' Motion") at 4.

The parties filed briefs on this matter in which Plaintiffs claimed they had offered to provide all necessary documentation at verification and were fully prepared to do so, and the Defendant directly disputed that allegation saying that at verification Plaintiffs' representatives had said they were unable to obtain or provide the necessary documentation. The parties to this proceeding were notified via an in-court status conference held on September 10, 2004, that the court intended to hold a hearing on this matter. The court held its hearing on November 19, 2004, to determine the accuracy of the directly conflicting factual statements made by the parties in their initial briefs. The court issued its order on August 24, 2005, instructing Commerce to re-evaluate and re-examine its decision by providing evidentiary support for utilizing partial adverse facts available, unrelated to SKF's alleged failure to offer evidence at verification, or in the alternative to re-calculate SKF's margin using SKF's own information. Commerce filed its Final Results of Redetermination on December 20, 2005, and recalculated SKF's margin as 6.19 percent for the period of review of May 1, 2001 to April 30, 2002. U.S. Dep't of Commerce, Final Results of Redetermination at 1 (December 20, 2005) ("Remand Redetermination"). Plaintiffs filed their Response on January 23, 2006, and Defendant filed its Reply on June 12, 2006. Oral argument was held on August 24, 2006.

III
Arguments

Commerce states that it has reconsidered its partial adverse facts available determination for SKF by reopening the record and allowing SKF to supply supporting documentation to re-calculate the antidumping duty margin. *Id.* Commerce further states that it complied with the court's order albeit under protest. *Id.*

Plaintiffs agree that Commerce properly recalculated SKF's margin without the use of partial adverse facts available and concur with the result of the Remand Redetermination, but not with much of its content. Plaintiffs' Comments on the Final Results of Redetermination ("Plaintiffs' Comments") at 1.

IV
Applicable Legal Standard

The Court of International Trade, when reviewing a challenge to the Department's final results of administrative review, will uphold Commerce's determinations unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i) (2003). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456, 462 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217, 83 L.Ed. 126 (1938)). Substantial evidence has been defined by the courts as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 1026, 16 L. Ed. 2d 131 (1966). The court, however, "may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' " *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Universal Camera*, 340 U.S. at 488).

V
Discussion

A
Commerce Properly Recalculated SKF's Antidumping Duty Margin in its Remand Redetermination

Commerce reopened the administrative record and conducted a second verification of SKF and Sarma on September 28–29, 2005.

Remand Redetermination at 4. Upon completion of the verification, Commerce recalculated SKF's margin using the company's own data and without the application of partial facts available. *Id.* According to Commerce the verification of Sarma's data required numerous steps and several personnel in order to demonstrate how Plaintiff compiled and reported its sales data. *Id.* at 11.

Commerce states in its Remand Redetermination that it disagrees with the court's August 24, 2005, Opinion. *Id.* at 4. It challenges the court's conclusions regarding Commerce's conduct during its administrative review and objects to the extra-record affidavits submitted by SKF for the court's review. *Id.* at 5. Defendant also states in its Remand Redetermination that it disagrees with what it calls "the court's 'verification test' " during the evidentiary hearing held on November 19, 2004. *Id.* at 12–13.

SKF agrees that Commerce properly verified Sarma's sales and properly recalculated SKF's margin. Plaintiffs' Comments at 2–3. SKF, however, disagrees with the Defendant's characterization of the proceedings before the Court of International Trade. *Id.* at 5–6.

B
Commerce May Not Relitigate This Matter

Defendant believes that it can reargue issues before the Court of International Trade based upon *dicta* in *Viraj Group, Ltd., v. United States*, 343 F. 3d 1371, 1376 (Fed. Cir. 2003). There, the Federal Circuit, addressed the issue of whether the government was a non-prevailing party and could assert a case or controversy. *Id.* In doing so, the court noted that "[e]ven though technically the prevailing party . . . the government prevailed only because it acquiesced and abandoned its original position, which it had zealously advocated, and adopted under protest a contrary position forced upon it by the court. Thus, in substance, the government is truly the non-prevailing party in this case." *Id.*

The government indicated at oral argument that it takes the Federal Circuit's reference to "zealous advocacy" as not only a predicate to preserving its rights of appeal, but as a virtual license to reargue and reject issues already decided by this court. Although the Defendant, like many litigants, may wish to re-argue and re-litigate issues already decided, it may not do so, without the prior permission of the court, at the trial court level.

This court simply does not read *Viraj* in the fashion asserted by the Government, nor does it understand the law to require reargument for purposes of preserving an appellate right. Rather, a party may preserve an issue by stating an objection or offering a document on the record. *See, e.g., Union Carbide Chem. & Plastics Tech. Corp. v. Shell Oil Co.*, 425 F. 3d 1366, 1374 (Fed. Cir. 2005) ("counsel . . . informed the district court that he 'would like to just read these [issues] into the record for purposes of preserving issues for appeal.'

After the district court allowed [counsel] to make his record, he objected to the jury instructions by requesting insertion of [specific] language. . . . Because [the party] sufficiently raised specific objections before jury deliberations, [it] did not waive its objections to the sufficiency of evidence on appeal."). Thus, if Defendant wishes to challenge this court's final decisions, the appropriate step is to file an appeal at the Court of Appeals for the Federal Circuit. It need not demonstrate any particular form of advocacy, it may not reargue its position before this court without first filing an appropriate motion for rehearing pursuant to USCIT R. 59, and it must not, in any case, act in a contumacious fashion.

As stated by the court, in its earlier opinion, the primary issue before it was "whether representatives of SKF did or did not offer to provide supporting documentation to Department officials from which they could verify the accuracy of Sarma's reported sales."[1]

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[1] In *SKF*, 391 F. Supp. 2d at 1329, the court stated:

> The core conflict between the parties is whether representatives of SKF did or did not offer to provide supporting documentation.

In its Remand Redetermination the Department of Commerce repeatedly characterized what the court did at the hearing which produced that opinion as a "verification test" which it argues, produced information which was insufficient for Department verifiers to have conducted a full audit. Remand Redetermination at 12–13.

In oral argument regarding this Remand Redetermination the court questioned Government counsel how the Department could take that position when at the oral argument, prior to the SKF opinion referenced above, the court stated:

> . . . . Mr. Tosini, let me state my concern to you as I did in September and October. *My concern is that somebody is lying to me.* Not whether the quantity of evidence is sufficient to meet the approval of the Department of Commerce, but rather–because that is discretionary on the part of the Department of Commerce, and I review it as to whether there is law or evidence to support it. I don't reweigh it. That is not what we are doing here.
>
> * * *
>
> *[I]t is about that specific factual question, did they make the offer to provide the information and was it turned down or not. . . .*

Transcript of November 19, 2004, Evidentiary Hearing ("Hr'g Tr.") at 228:5–24 (emphasis added).

Counsel for the United States informed the court that it was the Department's position that it could read the "core conflict" sentence in this court's opinion quoted above as meaning the court believed it was testing the adequacy of records offered at verification as opposed as to whether someone was lying about the offer of any records at all. Counsel also informed the court, that while the above quoted colloquy might make it clear that was not the court's intent, the Department felt it could look only to this court's opinion to determine its meaning, and not the discussion at oral argument or the pleadings or evidence before this court.

The court presumes that a competent and ethical agency official, adequately advised of the record before this court read this court's opinion in full, including its conclusion that ". . . there is well nigh irrefragable evidence that Commerce's representations regarding the events which occurred at verification were . . . not factually accurate. . . ." Nothing in that opinion or the record behind it identified the conflict between the parties as having been *which* information was offered as opposed to *whether* information was offered. *Id.* at 1333 (citing *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1337 (Fed. Cir. 2004)). Ac-

SKF USA Inc. et al. v. United States, Slip Op. 05–104 at 6, 391 F. Supp. 2d 1327, 1330 (CIT 2005). Commerce's attempts to characterize the course of events during the court's evidentiary hearing as a mini- verification is factually incorrect. *See* Remand Redetermination at 12–15. What the court determined at the hearing was that SKF and Sarma were able to provide the information requested by Commerce officials and would have done so at the time of the original verification. *SKF*, 391 F. Supp. 2d at 1331. That determination remains unchanged. What is particularly relevant to that conclusion is that "offers were made and persons, at Sarma, were able and available to send information to the verification site." Plaintiffs' Comments at 5. The court's Opinion of August 24, 2005, discusses the sequence of events that took place during Commerce's initial verification, the briefings, the evidentiary hearing, as well as the court's conclusion. *SKF*, 391 F. Supp. 2d at 1330–33. Commerce may not, by inaccurately recharacterizing the inquiry, findings, and holding of this court, be permitted to relitigate prior matters to the detriment of Plaintiffs, or of the judicial process.

The Department also challenges the court's conclusion that it should have "provided SKF with an opportunity to remedy its verification failure," pursuant to Section 782(d) of the Tariff Act of 1930, section 782(i) of the Act, and 19 C.F.R. § 351.307. Remand Redetermination at 16. As stated by the court in *SKF*, 391 F. Supp. 2d at 1336, Commerce's announcement of its decision to use partial adverse facts available in the *Final Results* without providing a cooperative respondent such as SKF the opportunity to respond is contrary to 19 U.S.C. § 1677m(d). Pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(b)(1)(B)(i), this court has the authority to remand matters to Commerce if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law" and instructed Commerce to re-examine the record of this case accordingly. *Id.*

C

Even If Commerce Could Reargue the Issues Previously Before This Court, It May Not Do So By Mischaracterizing, Misstating, and Misconstruing the Court's Opinion

Defendant states in its Remand Redetermination that "[a]t the center of this litigation are the questions of whether SKF/Sarma offered information to the Department's verifiers and, if so, whether the information would have supported Sarma's designation of sales to report and sales it did not report to the Department in its ques-

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cordingly, the Government's counsel having offered no better explanation, and based on the statements made in the Remand Redetermination this court has determined that the Department of Commerce's "interpretation" constitutes a mischaracterization of this court's opinion.

tionnaire response." Remand Redetermination at 6. The Department also claims that "[d]uring her depositions and during the Court hearing, [SKF Employee A] testified that, during the February 2003 verification, she recalled being asked to demonstrate the split between sales" but that the Commerce verifiers did not recall this offer. Remand Redetermination at 6–7. Defendant, however, continues to argue that "neither of the offers which [SKF Employee A] testified she made at verification would have been sufficient to verify the accuracy of the quantity and value figures Sarma submitted to the Department." *Id.* at 7.

What the court said at the hearing was the following:

> Court: [I]f any of those are available and she can get those materials and have them faxed to this Court, then I will accept that if they were capable of doing that, then if they can do it now without notice and without preparation, they certainly could have done it then, and it would weigh heavily in this Court's determination.

Hr'g Tr. at 11:8–14. The court expressly stated during the course of the hearing that:

> Court: Taken together, what I have right now is the testimony of [SKF Employee A] that she made the offer and [SKF Employee B] demonstrating that she has the ability to obtain information by calling her office.

Hr'g Tr. at 173:19–23. Thereafter, the court determined based upon the in-court hearing that "the court was able to test the recollections of Commerce officials as well as SKF officials. . . . Commerce officials did not clearly recollect whether they had specifically requested source documentation. . . . SKF officials on the other hand testified that they communicated their willingness and ability to provide such source documentation." *SKF*, 391 F Supp. 2d at 1332. The court did not at any juncture, opine or rule on whether SKF/Sarma's proffered documentation would have supported the information originally reported by SKF; it found that SKF/Sarma was able to physically provide the supporting documentation for the Department's review upon request. *Id.* Once again, the court stated on the record of the hearing that:

> Court: No, no, no. Once again, Mr. Tosini, let me state my concern to you as I did in September and October. My concern is that somebody is lying to me. Not whether the quantity of evidence is sufficient to meet the approval of the Department of Commerce, but rather–because that is discretionary on the part of the Department of Commerce, and I review it as to whether there is law or evi-

> dence to support it. I don't reweigh it. That is not what we are doing here.
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> * * *
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> [I]t is about that specific factual question, did they make the offer to provide the information and was it turned down or not. . . .

Hr'g Tr. at 228:5–24. Finally, the court summarized what transpired at the hearing on the record and clarified for the parties its basic concern:

> Court: [I]n the morning I asked [SKF Employee B], because my concern, and I don't know if you were told this, but what my concern is is that I have squarely contradictory testimony between the verifiers and the various Sarma representatives, be they outside or inside, as to the ability of Sarma to obtain information and ship it up to SKF so I said to [SKF Employee B] . . . "[i]t was a couple of years ago, but could you call your office right now and have them – talk to somebody and have them fax information to the United States?"
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> * * *
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> It seems to me if she could do it today, she could have done it a lot easier a couple of years ago, and it bothers me intensely, because what you and your colleague are testifying is "These individuals said we can't do it." Not that "We won't" or not that anything; specifically, "We can't do it," and she is in here and is incapable of doing it, and yet she vigorously in her deposition and in her affidavit statement said, "Oh, I could do it," so I asked her to do it and, by golly, she did it.

Hr'g Tr. at 254:17–256:6. Based upon this testimony and the court's observations of the witnesses' demeanor, it concluded that "SKF's versions of this particular series of events is strongly supported by the ability of SKF officials to provide the information from the subject period of review to the court on the day of the hearing." *SKF*, 391 F. Supp. 2d at 1332–33. In no instance did the court attempt to reweigh or verify the accuracy of the substantive data included in the provided documents and expressly stated that it "held a hearing on those conflicting presentations, not to reweigh the evidence presented, but to examine the very existence of the facts as stated by the parties." *Id.* at 1329. Defendant's attempt to mischaracterize, misstate, and misconstrue the court's processes, Opinion, and Order is improper in these, and in the following respects:

(1) The court found in its August 24, 2005, opinion that Commerce's decision was unsupported by substantial evidence. *SKF et al.*

v. United States, Slip Op. 05–104, 391 F. Supp. 2d 1327 (CIT 2005); *see* 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Universal Camera Corp.*, 340 U.S. at 477 (stating that "substantial evidence is more than a "mere scintilla." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). Commerce in its Remand Redetermination argues that the issue of whether SKF offered to provide supporting documentation at verification "was addressed fully on the record of the administrative review. . . ." Remand Redetermination at 2. By definition, the court's finding that "Commerce's announcement of its decision to use partial AFA for the first time in the Final Results, and to offer no opportunity for SKF to respond, correct, or clarify while finding SKF had not cooperated to the best of its ability, is unsupported by substantial evidence and not in accordance with law," means that it did not address this issue fully on the record of the administrative review. *SKF*, 391 F. Supp. 2d at 1336. Accordingly, Defendant is attempting to reargue its prior position rather than to simply preserve the issue for appeal.[2]

(2) Defendant states that it disagrees with the "conclusion that the extra-record affidavits SKF submitted with its brief to the court was the first time SKF had an opportunity to obtain relief concerning its failures at verification." Remand Redetermination at 5. The court, in its opinion, made no determination as to the timeliness of SKF's arguments or the filing of the affidavits in its original Motion for Judgment Upon the Agency Record. *See SKF*, 391 F. Supp. 2d at 1333–39. The court originally found and continues to find that Commerce did not provide SKF adequate notice of its decision to use partial AFA in calculating SKF's margin. *See id.*

(3) Commerce argues that in its view, "it had considered the matter fully and addressed it during the normal course of its administrative proceeding." Remand Redetermination at 6. Defendant is rearguing issues previously reviewed and decided. *See* Paragraphs 1) and 2) *infra*.

(4) Defendant's statement that "neither of the offers which [SKF Employee A] testified she made at verification would have been suf-

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[2] Defendant states that it "has not had the opportunity, as an agency, to address the proceedings that have transpired before the Court." Remand Redetermination at 4. Although counsel for the Department of Justice has represented the Defendant, United States, at all stages of this litigation and counsel for the Department of Commerce has appeared before this court at all hearings, Commerce seems to believe that it was not afforded the opportunity to voice its position to the court. At oral argument, the attorney for the U.S. Department of Justice stated that he is counsel for the United States and not counsel for the Department of Commerce. As such, the attorney for the Department of Justice argued that the Department of Commerce had not had the opportunity to present its argument before the court until it filed its Remand Redetermination. Upon further questioning from the court, the attorney for the Department of Justice refused to address any discussions between it and Commerce citing attorney/client privilege. Even though this court disagrees with Commerce's position, this is not the appropriate juncture to address this particular stance of the Department of Commerce.

ficient to verify the accuracy of the quantity and value figures Sarma submitted to the Department" is an attempt to reargue, without permission of the court, issues which were or which should have been briefed previously. Remand Redetermination at 7.

(5) Defendant further argues that it is clear to "the Department that, if [SKF Employee A] made these offers, they were not remotely sufficient to support the line items the Department selected in Sarma's verification worksheet. Remand Redetermination at 12. As noted above, the question before the court was not the sufficiency of the underlying data and whether or not the data provided by SKF could be audited to the satisfaction of Commerce, but rather it was to determine whether or not offers were made to provide documentation to Commerce officials. *SKF* 391 F. Supp. 2d at 1329. This court relied on evidence presented to it at or in court during the November 19, 2004, hearing and was satisfied that offers were made by SKF officials to provide any requested documentation to Department officials. *See id.*; *see also* Hr'g Tr. at 61:13–64:16 (Test. of [SKF Employee A]); Hr'g Tr. 92:21–94:5 (Test. of [SKF Employee A]); Hr'g Tr. 156:8–11 (Test. of [SKF Employee B]); Hr'g Tr. 173:19–22 (statement of the court). Defendant's statement to the contrary directly mischaracterizes the ruling of this court.

(6) Defendant alleges that what it calls the court's "verification test" was not sufficient to satisfy Commerce's audit procedures. Remand Redetermination at 15. Defendant states that it "agrees with Mr. Schauer's testimony that one invoice is not sufficient to demonstrate that the totals presented in each line item were accurate." Remand Redetermination at 13. Commerce may not in its Remand Redetermination reargue without the court's permission issues previously decided. *See* Paragraph 5 *infra*.

(7) Defendant says that it "finds that the fact that both the documentation submitted in Court and [SKF Employee A]'s claimed offers would have been insufficient calls into question Sarma's preparedness, ability, and willingness to provide the requisite documentation during the February 2003 verification." Remand Redetermination at 14. Defendant may appeal this court's rulings, but its position that it may ignore them is directly contrary to the concepts of judicial review articulated in *Marbury v. Madison* 5 U.S. 137, 175–76, 1 cranch 137, 68–70, 2 L. Ed. 60 (1803). *See also United States v. Dalcour*, 203 U.S. 408, 420, 27 S. Ct. 58, 59, 51 L. Ed. 248 (1906) (holding that the Circuit Court of Appeals shall exercise appellate jurisdiction to review final decisions in the District Courts, et cetera, in all cases other than those provided for in the preceding section, "unless otherwise provided by law."); *Ex parte Watkins*, 32 U.S. 568 (1833) ("[t]he jurisdiction of the court can *never depend* upon its decision upon the merits of a case brought before it; but upon its right to hear and decide it at all . . . it is the essential criterion of appellate jurisdiction that it revises and corrects the proceed-

ings in a cause already instituted, and does not create that cause." (emphasis in original) (citations omitted)). In this instance this court was satisfied and continues to remain satisfied that [SKF Employee A]'s offers were sufficient to substantiate SKF's claim that it had the ability to provide data requested by Commerce. *SKF*, 391 F. Supp. 2d at 1333. Since the Court of International Trade has original jurisdiction over matters arising out of the administrative decisions of the Department of Commerce, its decision that SKF offered to provide documentation can be challenged via appeal but not via reargument without permission of the court. *See* 19 U.S.C. § 1516a.

(8) Defendant states that "[n]owhere on the record of the review or in the documentation presented before the Court was there any indication of preparation by SKF or Sarma personnel to provide such information during the February 2003 verification." Remand Redetermination at 15. SKF officials testified in open court on November 19, 2004, that they were prepared for verification as well as able and willing to provide any documentation requested by Commerce officials and the court found that there was sufficient indication of that intent. *See SKF*, 391 F. Supp. 2d at 1332–33; *see also* Hr'g Tr. 53:10–18; 57:11–22; 73:2–13 (Testimony of [SKF Employee A]); Hr'g Tr. 153:23–154:16 (Test. of [SKF Employee B]); Hr'g Tr. 210:4, 213:2–5; 218:9–14 (Test. of [SKF Employee C]). The court is satisfied that SKF offered to provide supporting documentation to the Commerce verifiers. If the Department disagrees with that determination it must appeal it or seek a rehearing. It may not reargue it without the court's permission.

V
Conclusion

For the reasons stated above, Defendant's Remand Redetermination is hereby affirmed in part and stricken in part. Paragraph 1 at page 5 through paragraph 1 at page 9, and paragraph 1 at page 12 through paragraph 2 at page 17, of Defendant's Remand Redetermination are hereby stricken on the grounds that those portions misconstrue, misstate and/or mischaracterize the court's findings.

Slip Op. 06–142

GUANGDONG CHEMICALS IMPORT & EXPORT CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 05–00023

[Results of Department of Commerce remand determination sustained.]

Dated: September 18, 2006

Garvey Schubert Barer (*Ronald M. Wisla* and *William E. Perry*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*), *Arthur D. Sidney*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

OPINION

Restani, Chief Judge: Plaintiff Guangdong Chemicals Import and Export Corporation ("Guangdong") challenged the results of an administrative review of an antidumping duty order on sebacic acid from the People's Republic of China ("China"). Following oral argument, the court remanded for the Department of Commerce ("Commerce") to reconsider the reliability of data used to calculate the surrogate value of sebacic acid, and also to explain its choice to deduct a by-product credit from normal value, rather than from manufacturing costs. On remand, Commerce reexamined its data, excluded aberrational values, and explained its decision to change its policy with respect to by-product credits. Following remand, Guangdong asserts that Commerce's exclusion of aberrational values does not justify its use of less product-specific data. Guangdong also argues that Commerce's practice of deducting by-product credits from normal value is arbitrary, capricious and unsupported by substantial evidence. The court finds that Commerce's choice of data set and its treatment of the by-product credit are reasonable and supported by substantial evidence.

I. Background

In 1994, Commerce issued an order imposing antidumping duties on sebacic acid from China. *See Sebacic Acid from the People's Republic of China*, 59 Fed. Reg. 35,909 (Dep't Commerce July 14, 1994) (notice of antidumping duty order). On December 16, 2004, Commerce completed an administrative review of that order for the period of review ("POR") from July 1, 2002, to June 30, 2003. *See Sebacic Acid from the People's Republic of China*, 69 Fed. Reg. 75,303 (Dep't Commerce Dec. 16, 2004) (notice of final results of antidumping administrative review) ("*Final Determination*"). Two of Commerce's actions taken during that review are at issue in this case.

The first issue involves Commerce's valuation of sebacic acid. Because Guangdong's supplier of sebacic acid, Hengshui Dongfeng Chemical Co., produces a co-product, capryl alcohol, Commerce must allocate the supplier's costs of manufacturing between the two products based on their relative sales values. *See Section C and D Response of Guangdong Chems. Imp. & Exp. Corp.* (Nov. 4, 2003), P.R. Doc. 21, at D–4 ("*Section C & D Response*"). Because India does not

produce sebacic acid, Commerce relied on statistics describing the price of sebacic acid imported into India from other countries. *Prelim. Valuation of Factors of Prod.* (July 30, 2004), P.R. Doc. 47 at 1–2. Commerce chose to use import statistics maintained by the Indian government, based on a six-digit Harmonized Tariff Schedule ("HTS") category ("Indian government data"). *Id.*, P.R. Doc. 47 at 4, Attach. 4. That category lumped together imports of sebacic acid with imports of azelaic acid. *Id.*, P.R. Doc. 47 at Attach. 4. Guangdong advocated the use of product-specific data maintained by the publication *Chemical Weekly* in its Chemicals Import and Export trade database index ("*Chemical Weekly* data" or "ChemImpEx"). *Submission of Publicly Available Data for Use as Surrogate Value* (Sept. 8, 2004), P.R. Doc. 62 at 2 ("*Surrogate Value Submission*"). That data was taken from a selection of information from the Indian government, but included a classification specific to sebacic acid. *Id.*, P.R. Doc. 62. Because Guangdong's data included limited data points (in fact, only two imports, both from Germany, totaling 1,400 kilograms), Guangdong submitted additional corroborating data to bolster its limited data set. *Id.*, P.R. Doc. 62 at 2, Attach. 1. Without considering the impact of the corroborating data on the veracity of either data set, Commerce rejected the *Chemical Weekly* data and adopted the Indian government data. *See* Issues & Decision Memorandum for the 2002–2003 Antidumping Administrative Review of Sebacic Acid from the People's Republic of China, A–570–825, at 6–9 (Dec. 10, 2004) *available at* http://ia.ita.doc.gov/frn/summary/prc/E4-3678-1.pdf ("*Issues & Decision Mem.*"). Because Commerce failed to consider Guangdong's corroborating data, the court remanded this issue for additional consideration. *Guangdong Imp. & Exp. Co. v. United States*, 30 CIT ___ , ___ , 414 F. Supp. 2d 1300, 1313 (2006).

The second issue involves a change in Commerce's treatment of by-product credits. Because Hengshui produces fatty acid and glycerine as by-products of sebacic acid, Commerce gave Guangdong a credit reflecting the value of the by-products. *See Final Redetermination Pursuant to Court Remand* (May 3, 2006), Remand P.R. Doc. 4 at 7 ("*Final Redetermination*"). In its preliminary determination, Commerce applied this credit to the cost of manufacturing sebacic acid. *See id.* In its final determination, Commerce applied the credit against normal value, after calculating overhead costs, "special general and administrative" ("SG&A") expenses, and profits. *See id.* Commerce failed to provide an opportunity for interested parties to comment on this change in methodology before issuing its final determination. *Id.* Commerce therefore requested a remand in order to explain its application of the by-product credit. *Id.*

Commerce issued its *Final Redetermination* on May 3, 2006. As described more fully below, the *Final Redetermination* continued to use the Indian government data to value sebacic acid, but adjusted the Indian government data to eliminate aberrational values. *Id.*,

Remand P.R. Doc. 4 at 3, 5. Commerce also explained the rationale behind its application of Guangdong's by-product credit. *Id.*, Remand P.R. Doc. 4 at 7. Guangdong argues that Commerce's choice of data set remains unreasonable, and that Commerce's application of the by-product credit is unreasonable in light of generally accepted accounting procedures. *See* Pl.'s Comments on Def.'s Final Determination Pursuant to Court Remand at 1–2 ("Pl.'s Comments"). The court addresses each issue in turn.

II. Commerce's Use of the Indian Government Data to Calculate the Normal Value of Sebacic Acid

Because India does not produce sebacic acid, Commerce relied on import statistics to estimate the value of sebacic acid. As mentioned, Commerce used statistics from the Indian Department of Commerce's Import/Export Data Bank, based on a six-digit basket category in the Indian HTS,[1] which includes both sebacic acid and azelaic acid. *Issues & Decision Mem.* at 3. During the review, Guangdong offered more product-specific data compiled in an import and export database maintained on the website of the Indian publication *Chemical Weekly*. *Guangdong Chems. Imp. & Exp. Co. Case Br.* (Sept. 20, 2004), P.R. Doc. 65, at 4–6. Guangdong proposed using the *Chemical Weekly* data, which was based on a portion of the Indian government's information, but was further subdivided and included a specific subheading for sebacic acid.[2] *Surrogate Value Submission*, P.R. Doc. 62 at 2. Based on this data, Guangdong argued that the value of sebacic acid in India during the POR was $3,551.73.[3] *Id.*, P.R. Doc. 62 at 2. Guangdong corroborated its proposed value with data from U.S. import statistics for sebacic acid, benchmark price data from the publication *Chemical Market Reporter*, and prices for oxalic acid, a chemical asserted to be similar to sebacic acid. *Id.*, P.R. Doc. 62 at 2–3.

In response to Guangdong's proposed data, Commerce conducted additional research to determine whether prices of azelaic and sebacic acid were similar. *See Comparison of U.S. Int'l Trade Comm'n Dataweb Values for Sebacic Acid & Azelaic Acid Imps. to the United States* (Dec. 10, 2004), P.R. Doc. 79 at 1 ("*Price Comparison Mem.*"). It concluded that the two products were similarly priced, varying only by $.30 per kilogram over a twenty-three-month period during which the price for sebacic acid ranged between $2 and $3 per kilogram. *Id.*, P.R. Doc. 79 at 1. Commerce therefore used the broader Indian government data to arrive at a surrogate value of $15,826.30 for sebacic acid. *See Issues & Decision Mem.* at 9 (electing

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[1] The six-digit Indian HTS heading is 291713.

[2] The eight-digit heading for sebacic acid is 291713.02.

[3] All prices are in U.S. dollars per metric ton unless otherwise stated.

to use Indian government data); *see also Prelim. Valuation of Factors of Prod.*, P.R. Doc. 47 at 4 (using Indian government data to arrive at $15,826.30 per-metric-ton value for sebacic acid). In rejecting the *Chemical Weekly* data, Commerce reasoned that it could not determine how the *Chemical Weekly* data were derived from the Indian government information, and that the *Chemical Weekly* data lacked "a sufficiently broad range of import values." *See Issues & Decision Mem.* at 7.

Guangdong filed suit in this Court to challenge the results of the administrative review. *See Guangdong*, 30 CIT at ___, 414 F. Supp. 2d at 1300. Guangdong argued, *inter alia*, that Commerce had not supported its decision to use the Indian government data instead of the *Chemical Weekly* data. *Id.* at ___, 414 F. Supp. 2d at 1303. Because Commerce did not explain why it rejected the *Chemical Weekly* data without consideration of the corroborating data submitted by Guangdong, nor explained why the Indian government data were not aberrational, the court remanded for Commerce to address these infirmities in its reasoning. *Id.* at ___, 414 F. Supp. 2d at 1312–13.

In its *Final Redetermination*, Commerce retained use of the Indian government data, but "examined the U.S. import statistics, the European Union import statistics, and the *Chemical Market Reporter* data that Guangdong provided on the record for benchmarking purposes." *Final Redetermination*, Remand P.R. Doc. 4 at 5. Commerce noted that the value of sebacic acid in the *Final Determination*, $15,826.30, was significantly higher than the value of the "benchmark data," which showed a price of $3,061.54 for sebacic acid imported into the United States (excluding China, India and Korea), $3,098.42 for the European Union, and $4,187.60 developed from price quotes in the *Chemical Market Reporter*. *Final Redetermination*, Remand P.R. Doc. 4 at 5. On the basis of this evidence, Commerce found that its data for the POR were aberrationally high when compared with Guangdong's corroborating data. *Id.*, Remand P.R. Doc. 4. Consequently, Commerce reexamined its import data for India and determined that sales from the United States had skewed its results. *Id.*, Remand P.R. Doc. 4 at 5–6. After removing the aberrational data, Commerce found the Indian import price of sebacic acid to be $4,901.88. *Id.*, Remand P.R. Doc. 4 at 6. Despite these changes, Guangdong continues to argue that Commerce could not reasonably use the Indian government data when a more product-specific data set was on the record.

19 U.S.C. § 1677b (2000) provides that valuation of factors of production "shall be based on the best available information," but does not mandate that Commerce use any particular data source. *Id.* § 1677b(c)(1)(B). This gap in statutory authority leaves Commerce with considerable discretion in selecting a data source to calculate normal value. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). The court will uphold Commerce's deter-

mination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). The fact that the evidence on the record may support two inconsistent outcomes does not mean that the agency's selection of one alternative is unreasonable. *Goldlink Indus. Co. v. United States*, 30 CIT ___, ___, 431 F. Supp. 2d 1323, 1326 (2006) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)). Thus, "the court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' " *Id.* at ___, 431 F. Supp. 2d at 1326 (quoting *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984)).

In this case, Commerce identified "several factors, including the quality, specificity, and contemporaneity of the source information."[4] *Final Redetermination*, Remand P.R. Doc. 4 at 2. Commerce must "conduct a fair *comparison* of the data sets on the record" with regard to these factors. *Allied Pac. Food (Dalian) Co. v. United States*, 30 CIT ___, ___, 435 F. Supp. 2d 1295, 1313–14 (2006) (emphasis added). That is, Commerce's analysis must do more than simply identify flaws in the data sets it rejects. Commerce must also apply the same criteria to the data upon which it relies, and explain how the preferred data meet these criteria, or why a given criterion should not apply to the preferred data. The fact that a rejected data set is superior with respect to one criterion is not determinative so long as Commerce explains why the preferred data set is superior overall, and what steps were taken to ameliorate weaknesses in the preferred data.

This case involves two proposed data sets, the *Chemical Weekly* data and the Indian government data. The court's remand focused on Commerce's treatment of two criteria with respect to these data sets. First, the court remanded for Commerce to consider the "quality" of the Indian government data, i.e., its reliability in light of the evidence on the record. *Guangdong*, 30 CIT at ___, 414 F. Supp. 2d at 1313 ("Having failed to consider whether the $15,826.30 figure derived from the basket category was aberrational despite evidence of its wide variation from the value of the same basket category in another year, Commerce failed to present substantial evidence supporting its surrogate value for sebacic acid."). Second, the court remanded for Commerce to explain its choice not to use the more

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[4] In its preliminary determination, Commerce stated that it will select, "where possible, the publicly available value which was (1) [a]n average non-export value; (2) representative of a range of prices within the POR or most contemporaneous with the POR; (3) product-specific; and (4) tax exclusive." *Sebacic Acid from the People's Republic of China*, 69 Fed. Reg. 47,409, 47,411 (Dep't Commerce Aug. 5, 2004) (preliminary results of antidumping duty administrative review and notice of partial rescission).

product-specific *Chemical Weekly* data set, in spite of Guangdong's corroborating data. *Id.* at ___, 414 F. Supp. 2d at 1312 (remanding for Commerce to reconsider its "depart[ure] from its generally expressed preference for product-specific data" based on Guangdong's submission of corroborating evidence).

A. Commerce's Comparison of the Data Sets on the Record Was Reasonable

On remand, Commerce considered Guangdong's corroborating evidence and its implications for the "quality" of the Indian government data, which it had previously ignored. *See Final Redetermination*, Remand P.R. Doc. 4 at 5 ("In our *Final Results*, we did not address these data points that Guangdong provided for benchmarking purposes."). Commerce determined that Guangdong's corroborating evidence raised questions regarding the quality of the Indian government data. *Id.*, Remand P.R. Doc. 4 at 5 ("[W]e find that the period of review . . . average sebacic acid surrogate value from the Indian six-digit HTS category . . . is significantly higher than the average import value from the previous POR . . . and higher than the data provided by Guangdong from the European Union import statistics, the U.S. import statistics, and the *Chemical Market Reporter*."). Commerce chose to address this problem by excluding aberrational values.[5] *Id.*, Remand P.R. Doc. 4 at 5–6. The elimination of aberrational values has been held to be a reasonable means for compensating for flaws in a data set. *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, Slip-Op. No. 04–88, 2004 WL 1615597, at *12 (CIT July 19, 2004) (ordering exclusion of aberrational values from one country to avoid distortions in the overall value for a specific import category); Issues & Decision Memorandum for Final Determination in Steel Wire Rope from the People's Republic of China, A–570–859 (Feb. 14, 2001), *available at* http://ia.ita.doc.gov/frn/summary/prc/01-4895-1.txt (stating that Commerce "has excluded – where appropriate – aberrational data that appear to distort the overall value for a specific import category"). The court finds that Commerce's elimination of aberrational values constituted a reasonable step to compensate for some weaknesses in the Indian government data based on the evidence in the record.

Having adjusted the Indian government data, Commerce then performed a comparison of the Indian government data with the *Chemical Weekly* data offered by Guangdong. Commerce acknowledged that "it may appear that the eight-digit category developed by ChemImpEx is more specific than the six-digit [HTS] category," *Final Redetermination*, Remand P.R. Doc. 4 at 4, and also that the

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[5] Specifically, Commerce excluded imports from the United States, the price of which was ten-times greater than the price of imports from other countries during the POR. *Final Redetermination* at 5.

price of azelaic acid was, on average, about 18.75% higher than the price for sebacic acid during the POR. *Id.* at 6. Despite these relative strengths of the *Chemical Weekly* data, Commerce found that, on balance, the Indian government data were the best available information on the record. Commerce also found that Guangdong's corroborating information "d[id] not remedy the deficiencies in quality or the limited number of data points in the [*Chemical Weekly*] data provided by Guangdong for sebacic acid." *Final Redetermination*, Remand P.R. Doc. 4 at 5.

Commerce rejected the *Chemical Weekly* data primarily for two reasons. First, Commerce found that it was unclear how the data reported in *Chemical Weekly's* ChemImpEx database were selected. Although the parties appear to agree that the *Chemical Weekly* data were developed using information obtained from the Indian government, the *Chemical Weekly* data did not use all of the available data. *See* Pl.'s R. 56.2 Mot. J. Agency Record 16 (stating that the *Chemical Weekly* data were "derived from ship manifest data collected by Indian Customs authorities"); *Final Redetermination*, Remand P.R. Doc. 4 at 4 (stating that the *Chemical Weekly* data were "derived from the Daily Lists published by the customs authorities in India," and noting that "ChemImpEx does not provide the methodology on how the data was selected or from where the data [were] derived"). Only about half of the sebacic and azelaic acid imported into India is represented in the statistics from *Chemical Weekly's* database. *Final Redetermination*, Remand P.R. Doc. 4 at 4. Commerce found no information on the record showing why certain imports were included, while other imports were not. Consequently, Commerce could not be sure that the data were "truly representative of the full data set from which [they were] derived." *Id.*, Remand P.R. Doc. 4 at 4. A lack of information regarding the selection of data in a data set raises concerns distinct from concerns raised by the size of that data set. Without information on how transactions were chosen for inclusion in the *Chemical Weekly* data, Commerce could not be certain that the method used to select imports in the *Chemical Weekly* data was not biased.

Second, Commerce noted that the *Chemical Weekly* data included only two data points, consisting of two sales from the same company in Germany to India. *Id.*, Remand P.R. Doc. 4 at 4. By contrast, the Indian government data, even after removing aberrational values, represented imports from five different countries. *Id.*, Remand P.R. Doc. 4 at 6. The use of broader product categories is reasonable, despite the availability of product-specific data, if a greater variety of data provides greater reliability. *See Writing Instrument Mfrs. Ass'n v. U.S. Dep't Commerce*, 21 CIT 1185, 1195–96, 984 F. Supp. 629, 639–40 (1997) (approving use of basket category of import statistics from Pakistan, rather than more product-specific data from India, where Commerce found substantial evidence on the record suggest-

ing that the Indian data were "aberrational and unreliable"). The court therefore finds that Commerce's decision to use the Indian government data is supported by substantial evidence.[6]

B. Guangdong's Additional Arguments

Guangdong claims that Commerce's decision merely to adjust the Indian government data cannot be reasonable in view of the evidence Guangdong submitted showing prices of $32,045.58 for azelaic acid and $3,551.73 for sebacic acid. Pl.'s Comments at 4; *see also* Pl.'s R. 56.2 Mot. J. Agency Record at Attach. 1 (submitting data for azelaic acid). Guangdong argues that the presence of azelaic acid in the Indian government data must have skewed the price for sebacic acid upwards because the price of azelaic acid was almost ten-times that of sebacic acid. Pl.'s Comments at 4.

This argument assumes that the price of azelaic acid shown in the *Chemical Weekly* data is reliable. Commerce has explained that the prices in the *Chemical Weekly* data are unreliable because they do not account for all imports of sebacic acid or azelaic acid into India, and it is unclear how the selected data were chosen. *Final Redetermination*, Remand P.R. Doc. 4 at 4 ("Although the data [in *Chemical Weekly's* Chemicals import/export database] was originally derived from the Daily Lists published by the customs authorities in India, using a classification system that has been developed by *Chemical Weekly*, [it] does not provide the methodology on how the data was selected or from where the data was derived."). Morever, the evidence on the record supporting Guangdong's asserted price for azelaic acid is weaker than the evidence supporting Guangdong's asserted price for sebacic acid. Guangdong has not presented any evidence corroborating the *Chemical Weekly* data's price for azelaic acid. Evidence submitted by Guangdong shows that the price of azelaic acid exported to India from the United States was between four and eight times greater than the price of other azelaic acid imported by India in the same period. See Pl.'s R. 56.2 Mot. J. Agency Record at Attach. 1 (showing U.S. export price of 2855 rupees per kilogram of azelaic acid, as compared to 316 rupees per kilogram from Malaysia and 636 rupees per kilogram from Japan). In fact, as Guangdong points out, other evidence in the record shows that prices for azelaic acid in the United States were substantially lower than the $32,045.58 found in the *Chemical Weekly* data. Pl.'s Comments at 6 ("Commerce's own analysis shows that U.S. prices for both azelaic acid and sebacic acid are priced BELOW $3,000 per metric ton."). Finally, Commerce conducted its own analysis of the prices of azelaic acid and sebacic acid, and found a much smaller

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[6] Because the court finds that these reasons are sufficient to justify Commerce's choice of data sets, the court does not address Commerce's arguments concerning imports from Malaysia and the purity of sebacic acid imports in the *Chemical Weekly* data.

variation. *See Final Redetermination*, Remand P.R. Doc. 4 at 6, Attach. 1 (finding that the U.S. prices of sebacic acid were on average only 18.75 percent lower than those of azelaic acid during the POR). Commerce was therefore justified in concluding that inclusion of azelaic acid in the Indian government data did not skew the surrogate value of sebacic acid as much as Guangdong claims.

In a similar argument, Guangdong attacks Commerce's comparison of U.S. prices of azelaic and sebacic acid to establish the average variance in price between the two products. Pl.'s Comments at 5–6. Guangdong argues that Commerce has not adequately explained why it did not rely on the Indian prices from *Chemical Weekly* for the purpose of comparing the respective prices of sebacic and azelaic acid instead. *Id.* The impact of this argument is blunted by the absence of evidence corroborating the price of azelaic acid found in the *Chemical Weekly* data. Given the absence of evidence corroborating Guangdong's price, and the aberrationally high price of azelaic acid exported from the United States, it was reasonable for Commerce to conclude that U.S. domestic price data were the more appropriate benchmark for comparison. *See Timken Co. v. United States*, 26 CIT 434, 446–47, 201 F. Supp. 2d 1316, 1328 (2002) (stating that use of U.S. data as a benchmark to "determine the reliability of . . . surrogate data is within 'Commerce's statutory authority and consistent with past practice.' " (quoting *Peer Bearing Co. v. United States*, 22 CIT 472, 481, 12 F. Supp. 2d 445, 455 (1998))).

Finally, Guangdong argues that Commerce's surrogate value of sebacic acid cannot be reasonable because it exceeds the prices reflected in Guangdong's corroborating data. Pl.'s Comments at 5. The mere fact that Commerce's surrogate value is higher than one or all of Guangdong's benchmarks does not mean that that value is unreasonable per se. Guangdong notes that Commerce's surrogate value is 60 percent higher than U.S. imports of sebacic acid, 58 percent higher than European Union imports of sebacic acid, 17 percent higher than price in the *Chemical Market Reporter* data, and 38 percent higher than Guangdong's proposed surrogate value. *Id.* Still, Guangdong's own corroborating evidence exhibits similar levels of variation. For example, the value found in the *Chemical Market Reporter* data ($4,187.60) is 36.7 percent greater than the value established by the U.S. import prices, and 35.1 percent greater than the value of the imports into the European Union. *See id.* Moreover, Commerce's price is lower than the surrogate values for sebacic acid found in other administrative proceedings. *See* Issues & Decision Memorandum for Final Results of Changed Circumstances Review in Sebacic Acid from the People's Republic of China, A–570–825, at 17 (Mar. 23, 2005), *available at* http://ia.ita.doc.gov/frn/summary/prc/E5-1401-1.pdf (finding surrogate value of sebacic acid to be $5,459.72 during the POR of July 1, 2002, to June 30, 2003, and noting a surrogate value of $5,388.66 for the administrative review con-

ducted between July 1, 2000 and June 30, 2001, after adjusting for inflation). Given the variation among the corroborating data, the court finds that Commerce's surrogate value is not unreasonably high.

The court therefore affirms as reasonable Commerce's analysis of the reliability of the Indian government data in view of the corroborating evidence submitted by Guangdong.

III. Commerce's Application of the By-Product Credit to Normal Value

The remaining issue in this case arises from Commerce's treatment of by-product revenue from sales of fatty acid and glycerine made in the process of manufacturing sebacic acid. Congress has mandated that, in cases involving imports from non-market economies, Commerce must calculate the normal value of a respondent's factors of production using a surrogate data source from a country of similar size and economic development. 19 U.S.C. § 1677b(c)(4). The law requires Commerce to calculate normal value based on a number of factors of production, including labor, raw materials, energy used, and the cost of capital. *Id.* § 1677b(c)(3). After determining the costs of these materials, Commerce must also add "an amount for general expenses and profit plus . . . other expenses." *Id.* § 1677b(c)(1). These general expenses are calculated using "financial ratios" based on a surrogate's overhead costs, SG&A, and profits. *See Goldlink Indus.*, 30 CIT at ___, 431 F. Supp. 2d at 1333. In this case, Commerce derived these ratios using data from the Reserve Bank of India Bulletin. *See Prelim. Valuation of Factors of Prod.*, P.R. Doc. 47 at 8. Commerce calculated the "overhead ratio" by dividing total factory overhead by the cost of "direct items" (including, *inter alia*, raw materials, power and labor). *See id.* at Attach. 8. For SG&A, Commerce divided total SG&A expenses by the sum of direct items and factory overhead. *See id.*, P.R. Doc. 47 at 8. Finally, to generate the profit ratio, Commerce divided the amount of pre-tax profits by the sum of direct items, factory overhead and SG&A. *See id.*, P.R. Doc. 47 at 8. These ratios were then applied to the respondent's surrogate values to determine the amount of overhead, SG&A and profits. *See generally Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT ___, ___, 366 F. Supp. 2d 1264, 1277 n.7 (2005) (describing calculation of financial ratios).

19 U.S.C. § 1677b(c) does not mention the treatment of by-products, nonetheless, Commerce sometimes grants a respondent a "credit" for a "by-product . . . generated in the manufacturing process [that is] either reintroduced into production or sold for revenue." *Final Redetermination*, Remand P.R. Doc. 4 at 7. Both by-products in this case are sold for revenue. *Id.* , Remand P.R. Doc. 4 at 12. In its preliminary results, Commerce deducted by-product revenues from manufacturing costs, before applying the financial ratios. *Id.*, Re-

mand P.R. Doc. 4 at 7. In its final results, however, Commerce determined that the by-product credit should have been deducted from normal value, after calculation of overhead, SG&A and profit amounts based on the cost of manufacturing. *Id.*, Remand P.R. Doc. 4 at 7.

In the past, Commerce's practice was to apply by-product credits against the manufacturing costs of the respondent, prior to the calculation of overhead, SG&A and profits. *See id.* Remand P.R. Doc. 4 at 7; *see also Union Camp Corp. v. United States*, 22 CIT 267, 270, 8 F. Supp. 2d 842, 846 (1998) (noting that in its 1996 antidumping administrative review of sebacic acid from China, Commerce subtracted by-product sales revenues from the manufacturing cost of sebacic acid). Because overhead, SG&A and profits are calculated based on manufacturing costs, a reduction in manufacturing costs reduces overhead, SG&A and profit amounts as well. Commerce recently adopted a new policy with respect to by-product credits. *Final Redetermination*, Remand P.R. Doc. 4 at 7–8. Commerce now looks to the financial statement of the company (or companies) used to calculate surrogate value and applies the by-product credit in the same manner as the surrogate does. *Id.*, Remand P.R. Doc. 4 at 7–8. In the event that the surrogate financial statement does not state how by-product revenue is applied, Commerce will "consider other information on the record, such as whether the by-product was re-introduced into the production process or sold for revenue purposes." *Id.*, Remand P.R. Doc. 4 at 8. In this case, Commerce found that deducting the by-product credit from normal value, after applying the financial ratios, was "appropriate . . . because it is reflective of the respondent's practice to sell the by-product as opposed to reintroducing it into the production process." *Id.*, Remand P.R. Doc. 4 at 8. This methodology does not reduce manufacturing costs prior to the calculation of overhead, SG&A and profit amounts, which in turn results in a higher normal value and dumping margin.[7] Guangdong argues that "[t]here is no rational basis for Commerce's departure from its longstanding administrative practice of applying the by-product offset as an adjustment to production costs." Pl.'s Comments 11.

Commerce claims that this methodology was approved as reasonable in *Sinopec Sichuan Vinylon Works v. United States*, 29 CIT ___, ___, 366 F. Supp. 2d 1339, 1351 (2005). *Sinopec* involved

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[7] For example, assume that a respondent has manufacturing costs of $1000, financial ratios of 20%, and receives a by-product credit of $100.

Using Commerce's old methodology, that company would have a normal value of $1080. ($1000 − $100 = $900; $900 + ($900 × .2) = $1080). Using Commerce's new methodology, and assuming the by-product was sold, that company would have a normal value of $1100. ($1000 + ($1000 × .2) = $1200; $1200 − $100 = $1100). The dispute in this case does not involve the size of the by-product credit itself, but whether a respondent should receive the added benefit ($20 in the example above) associated with reduced overhead, SG&A and profit amounts.

a respondent, Sinopec Sichuan Vinylon Works ("SVW") that produced polyvinyl alcohol ("PVA") in China. *Id.* at ____, 366 F. Supp. 2d at 1340. Commerce chose a company in India, Jubilant, which produced a precursor to PVA, polyvinyl acetate ("PVAc"), to act as a surrogate. *Id.* at ____, 366 F. Supp. 2d at 1340–41. SVW produced a by-product, acetic acid, when it converted PVAc into PVA. *Id.* at ____, 366 F. Supp. 2d at 1341. SVW "recover[ed] and reuse[d]" this by-product in its production process. *Id.* at ____, 366 F. Supp. 2d at 1351. Because Jubilant did not produce PVA, it did not produce acetic acid as a by-product of converting PVAc into PVA.[8] *Id.* Commerce determined that SVW should receive a by-product credit for producing acetic acid, but because Jubilant did not produce acetic acid as a by-product of converting PVAc to PVA, Commerce determined that it should not apply the by-product credit before applying Jubilant's financial ratios to the cost of manufacture. *Id.* at ____, 366 F. Supp. 2d at 1349–50. Commerce's practice was not intended to account for additional costs associated with the production of acetic acid, however, but to ensure that deduction of the by-product credit did not artificially distort the overhead, SG&A and profit expenses associated with the production of PVAc. *Sinopec*, 29 CIT at ____, 366 F. Supp. 2d at 1348 (stating that Commerce's determination to apply the by-product credit after the financial ratios was intended "to equate the base on which the ratios were calculated with the base to which they were applied").

Commerce's reasoning in *Sinopec* was entirely different from its reasoning in the *Final Redetermination*. In this case, Commerce never suggested that the application of financial ratios to cost of manufacturing data before deduction by-product revenues would mischaracterize Hengshui's cost of manufacturing sebacic acid. Rather, Commerce applied the by-product credit after the financial ratios to reflect the fact that, where a by-product is sold, "the by-product necessarily incurs expenses for overhead, SG&A, and profit." *Final Redetermination*, Remand P.R. Doc. 4 at 12. Thus, the reasoning behind *Sinopec* does not support Commerce's determination in this case.

Turning to Commerce's explanation in the *Final Redetermination*, the court finds that the remainder of Commerce's analysis provides a reasonable basis for its decision to apply by-product credits after a surrogate's financial ratios where the by-product is sold. Hengshui sells two by-products, revenue from which may be used to offset the cost of producing sebacic acid. Where a by-product is sold, Commerce assumes that the respondent would incur overhead, SG&A and profit expenses in selling the by-product. *Final Redetermination*, Remand P.R. Doc. 4 at 12. The Reserve Bank of India statistics, from

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[8] Jubilant produced acetic acid as a by-product, but not at the relevant stage of production. *Id.* at ____, 366 F. Supp. 2d at 1351.

which Commerce derived its surrogate financial ratios, include "selling commission[s]," "bad debts," and advertising as sales expenses. *See Prelim. Valuation of Factors of Prod. Mem.*, P.R. Doc. 47 at Attach. 8. A respondent's sales of a by-product would appear to incur each of these costs over and above what a surrogate spends to sell its primary products. If the surrogate does not produce a similar by-product, it would be reasonable for Commerce to conclude that the surrogate would not incur these expenses. Therefore, it is reasonable for Commerce to adjust a by-product credit to reflect the additional sales expenses incurred by the respondent.

Guangdong argues that Commerce could not reasonably have chosen to account for separable costs associated with the sale of a by-product by changing the point at which it applies the by-product credit. Guangdong notes that, as a matter of accounting procedure, by-products are commonly subtracted from the cost of manufacturing a main product. *See* Pl.'s Comments at 11 ("[G]enerally accepted accounting principles . . . normally treat both by-product income and by-products consumed in the production process as offsets to manufacturing costs.") (emphasis removed); *see also* Charles T. Horngren & George Foster, *Cost Accounting: A Managerial Emphasis* 490 (6th ed. 1987) ("The estimated net realizable values of [by-products and scrap] are best treated as deductions from the cost of the main products.") (emphasis removed). Nevertheless, it appears that "[c]onsiderable variation exists in accounting for by-products." Wayne J. Morse & Harold P. Roth, *Cost Accounting* 157 (3d ed. 1986). Indeed, in some circumstances, by-product sales may be credited to miscellaneous income. *Id.* at 158.

The court's opinion in *Magnesium Corp. of America v. United States*, 20 CIT 1092, 1107–08, 938 F. Supp. 885, 900 (1996), supports Commerce's treatment of the by-product credit. In that case, in its preliminary determination, Commerce subtracted a by-product credit from the respondent's cost of materials, before calculating the cost of manufacturing.[9] *Id.* at 1106, 938 F. Supp. at 899. In its final determination, Commerce changed its practice and applied the by-product credit after calculating the cost of manufacturing, thus increasing the amount of factory overhead. *Id.* Commerce did this to reflect "the by-product processing costs, thereby eliminating the need for valuing any additional processing-related elements." *Id.* (quotations omitted). Plaintiff argued that separable by-product processing costs should have been deducted from by-product revenues, and that the by-product revenue should have been deducted before calculating manufacturing cost. *Id.* The court disagreed, finding that Commerce's decision to change the timing of the application of the

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[9] Cost of manufacturing is composed of the cost of materials plus factory overhead, which is calculated by multiplying cost of materials by a factory overhead ratio. *See Magnesium Corp.*, 20 CIT at 1106, 938 F. Supp. at 899.

by-product credit was a reasonable means of "account[ing] for . . . costs related to by-product processing" while avoiding "costly accounting procedures" not warranted for by-products. *Id.* at 1107, 938 F. Supp. at 900. Similarly, Guangdong's argument implies that Commerce should have calculated a separate overhead, SG&A and profit amount for Hengshui's by-products, deducted that amount from the by-product credit, and then deducted the remaining by-product credit from manufacturing costs. This would require Commerce to engage in just the "costly accounting procedures" that the court in *Magnesium Corp.* found to be unnecessary. As in *Magnesium Corp.*, Commerce's decision to change when it applies the by-product credit is a reasonable alternative means of accounting for additional overhead, SG&A and profit expenses associated with Hengshui's sale of by-products. Even if Guangdong's alternative approach to implementation of the statute were reasonable, the court could not substitute its own view of the statute for Commerce's reasonable interpretation or implementation. *Id.* (citing *Chevron, U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

Therefore, the court upholds Commerce's decision to account for separable costs associated with by-product sales by applying a by-product credit after application of financial ratios to manufacturing costs.

IV. Conclusion

The results of the remand determination are sustained in their entirety.